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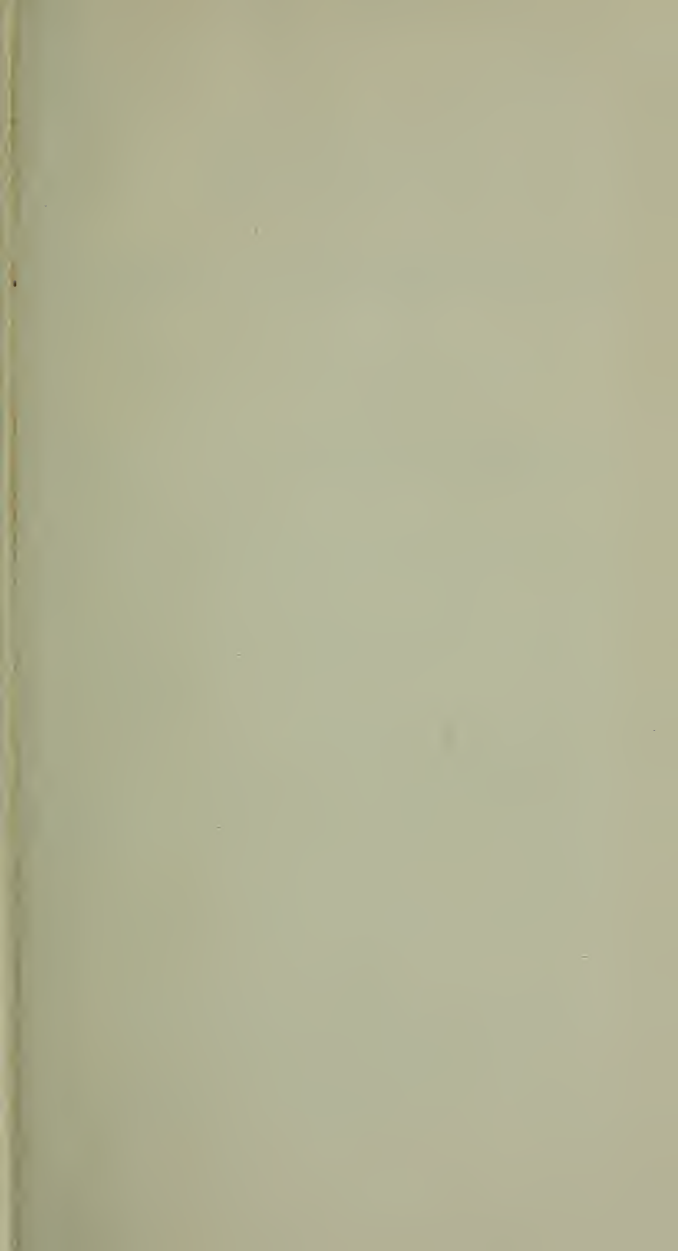


UNIVERSITY OF  
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Law  
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W. J. C. Boyd. I

A

# MANUAL

OF

## EQUITY JURISPRUDENCE,

FOUNDED ON

STORY'S COMMENTARIES

AND

SPENCE'S EQUITABLE JURISDICTION,

AND COMPRISING IN A SMALL COMPASS

The Points of Equity usually occurring

IN

CHANCERY AND CONVEYANCING,

AND IN

THE GENERAL PRACTICE OF A SOLICITOR.

BY JOSIAH W. SMITH, B.C.L.,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW,

*Editor of Mitford's "Chancery Pleadings," and Fearne's "Contingent Remainders,"  
and Author of "A Compendium of the Law of Real and Personal Property."*

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Fifth Edition.

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256190  
6.7.31

LONDON :

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

26, BELL YARD, LINCOLN'S INN;

EDINBURGH: T. & T. CLARK; DUBLIN: HODGES & SMITH.

MDCCCLVI.

LONDON :  
PRINTED BY C. ROWORTH AND SONS, BELL YARD,  
TEMPLE BAR.

# PREFACE

TO THE FIFTH EDITION.

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THE Writer has searched the authorized Reports published since the printing of the Fourth Edition, and has added such further points to be found in those Reports as appeared to him to be requisite to be noticed in a Book of this kind, as well as some references to new cases in support of points previously decided.

J. W. S.

1, *Old Square, Lincoln's Inn,*  
*Trinity Term, 1856.*

# PREFACE

TO THE FOURTH EDITION.

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THE Third Edition having been sold off in less than a year, a New Edition has been required much earlier than the Writer anticipated. He has, however, made some few improvements; and he has taken the opportunity of perusing the additions which have been made to the last (the sixth) edition of Story's Equity Jurisprudence, which was published in the year 1853, and has, so far as it seemed to be necessary, incorporated such of them as are supported by English authorities, as well as the result of such of the later decisions in the authorized Reports as appeared to him requisite to be noticed in a Book of this kind.

J. W. S.

1, *Old Square, Lincoln's Inn,*  
*October, 1854.*

# PREFACE

TO THE THIRD EDITION.

---

THIS Edition is founded on the learned and very valuable Treatise on "The Equitable Jurisdiction of the Court of Chancery," by the late George Spence, Esq., Q.C., as well as on the celebrated work on which the preceding Editions were founded.

The second volume of Mr. Spence's work (published in the year 1849) contains upwards of 900 pages of Equity Jurisprudence, of which the writer of the Manual has, in this Edition, availed himself in the same way as he had previously made use of the work of Mr. Justice Story. As the result of this additional labour, so many important points have been added, that the bulk of the Manual has been unavoidably increased by about 60 pages.

By the incorporation of these points, the Book has been very greatly improved; but the writer has not otherwise undertaken to add subsequent decisions.



# PREFACE

TO THE SECOND EDITION.



THE writer of these pages, in publishing the first edition, was under no apprehension that a work answering to the title of the present little book would be deemed *unnecessary*. On the contrary, he was not aware of the existence of any book purporting to give a succinct yet comprehensive view of the leading principles of Equity Jurisprudence; and he believed that the want of a book of that description was greatly felt by students, and indeed by many practitioners in each branch of the profession. For, the student labours under great disadvantages, when he enters upon the perusal of a large Treatise, without having previously read any smaller work upon the same subject; and after he has read a work of two volumes, he is able accurately to retain but few points in his memory—far fewer than he would after a careful perusal of a condensed work. And the practitioner often stands in need of a body of points and principles,

upwards of 1700 pages ; omitting points of law in some instances, and such cases in equity as are of a peculiar nature, and not likely to occur again ; and also omitting (except where it seemed advisable to use them as examples) such cases as are of so simple and obvious a character, that the decisions respecting them embody nothing more than so plain and necessary an application of points and principles stated in the work, that it would be sure to suggest itself at once, without variation, to the minds of different individuals.

A host of English treatises and cases are cited by the learned Judge and Author, exclusively of the American decisions. The points comprised in the following pages are those in support of which English authorities are cited.

The want of references to the authorities themselves, may seem, at first sight, to be a strong ground of objection, in the eyes of those who do not possess the Commentaries. But, in reality, it is not so. For the insertion of those references would have doubled the bulk and price of the Manual : and it is rarely necessary or advisable for the student to consume his time by referring to the authorities ; and, with respect to those who are engaged in practice, the earlier editions of the Commentaries contain almost all the sections referred to in these pages, numbered in the same

manner; although the last, that is, the fourth, edition, is the edition of the Commentaries from which the present edition of the Manual has been prepared for the press.

The writer has generally prefixed the word “see” to the references, where he has interspersed original matter, or has modified, in point of substance, the statements he has taken from the Commentaries, with reference to cases contained in other passages, or otherwise; or where he has deduced, rather than abstracted, the points from a passage in the Commentaries; or where he has blended together, for the sake of brevity, precision, or otherwise, the ideas contained in two or more passages; or where he has expressed his own views, or has laid down original propositions, but has referred to passages in the Commentaries in support of such views or propositions. For those paragraphs to which no reference is added, he alone is responsible.



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A

MANUAL

OF

EQUITY JURISPRUDENCE.

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INTRODUCTION.

SECTION I.

*Of the Nature of Equity Jurisprudence, and  
the Extent of Equity Jurisdiction.*

To explain the true nature of Equity Jurisprudence with brevity, perspicuity and accurate precision, is a task of great difficulty (see Story's Com. Ch. I. *passim*), on account of the mixed character of the science, and the immense extent of learning which for this purpose it is necessary for the mind to survey at one and the same time. It is most important, however, that some attempt be made to accomplish this, before the reader's attention is directed to the particular doctrines of the

INTROD.  
SEC. I.

Difficulty  
and import-  
ance of the  
inquiry.

INTROD. vast and admirable system, the principal fea-  
 SEC. I. tures of which it is the design of these pages  
 — to delineate.

Definition of  
 equity juris-  
 prudence.

The writer believes it is impossible to give a short definition of Equity Jurisprudence, without either failing to convey any accurate and definite knowledge, or else positively misleading the student. But Equity Jurisprudence in the specific and technical sense of the term, as contradistinguished from natural, abstract and universal Equity, and from Law and the Statutory Jurisprudence of the Court of Chancery, may be described to be; a portion of justice or natural Equity, not embodied in legislative enactments or in the rules of the Common Law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights in respect whereof relief is sought come within some general class of rights enforced at Law, or may be enforced without detriment or inconvenience to the community, but where, as to such particular rights, the Courts of Law cannot, or originally did not, clearly afford any relief, or adequate relief, at least not without circuitry of action or multiplicity of

suits, or cannot make such restrictions, adjustments, compensations, qualifications, or conditions, as may be necessary in order to take due care of the rights of all who are interested in the property in litigation. Although there may possibly be some peculiar cases which may at first sight be thought to prove this description to be faulty, yet it will probably appear, on closer consideration, that such cases (if any such there are) are not to be regarded as illustrative of the general character of Equity Jurisprudence; and it will probably be found, and the following observations may tend to show, that such description conveys a just notion of the true nature of that moral science.

I. In the most general sense Equity is synonymous with natural justice. (See St. § 1, 2.) But Equity, as contradistinguished from Law, and as administered in our Courts of Equity, has a much narrower and an otherwise different signification. Many matters of natural justice, by the Equity Jurisprudence of this and every other civilised nation, are left to be disposed of *in foro conscientiæ*, from the difficulty of framing any general rules to meet them, and from the mischief and incon-

INTROD.  
SEC. I.  
—

Equity jurisprudence is not synonymous with natural justice.

INTROD. venience which would arise from attempting  
 SEC. I. judicially to enforce such duties as charity,  
 — gratitude, and kindness, or even positive engagements, where they are not founded on a valuable consideration, or, at least, on what is deemed a good consideration. (See St. § 2, 8, note, and § 14; 1 Sp. 447, n. (*d*).)

And, on the other hand, setting aside the body of natural justice which is comprised in statutory provisions, a vast proportion of what is specifically denominated Law, as contradistinguished from what is technically designated Equity, has been reared up independently of legislative enactments or arbitrary or conventional rules, and consists, in the main, of a system of natural Equity or justice, modified so as to be adapted to the manifold and complicated relations and exigences of a highly artificial state of society. (See St. § 7, 8, notes, and § 20, 34.) And as to the construction of statutes, a Court of Law is bound to interpret them according to the intention of the legislature, as much as a Court of Equity: indeed, both adopt the same principles of interpretation. (See St. § 15.)

So that, on the one hand, natural justice or Equity is not excluded from a Court of

Law; nor, on the other hand, is it carried out to an unlimited extent even in a Court of Equity. And in the cases to which it is applied in a Court of Equity, it is not always applied in an unmodified form, but is qualified (as we shall see in the next Section and in subsequent pages) by a due regard to legislative enactments and the rules of the Common Law, and to the varied and complicated relations and the general convenience of the subsisting order of things.

INTROD.  
SEC. I.  
—

The truth, then, appears to be this: first, that a large portion of natural Equity is left to be administered *in foro conscientiæ*; because, in addition to the difficulty of propounding precise rules applicable to all cases, a greater detriment and inconvenience to the community would probably ensue from attempting to enforce it in the public Courts, than from leaving it to the decision and the power of conscience, and to the various motives by which mankind are ordinarily influenced. Secondly, that another large portion of natural Equity, in a modified form, is administered by the Courts of Law, and is denominated Law, in contradistinction to what is technically termed Equity. And thirdly, only a portion, therefore, of natural

A large portion of natural justice is left to conscience.

Another large portion is administered, in a modified form, in courts of law.

That which is administered in courts of

INTROD.  
SEC. I.

equity is  
therefore  
only a por-  
tion of na-  
tural justice,  
and in a mo-  
dified form.

Equity, and that in a modified form, is administered in a Court of Equity; and that portion is specifically and technically called Equity, in contradistinction as well to the two other portions of Equity, or to natural, abstract, and universal Equity or justice in general, as to legislative enactments, and arbitrary, feudal, or simply conventional rules.

Where there  
is no remedy  
at law, and  
equity has  
exclusive  
jurisdiction.

II.—1. There are particular rights which come within some general class of rights enforced at law, or capable of being judicially enforced, not only in particular instances, and to the benefit of particular individuals, but in all cases, and to the advantage of the community at large; and yet there are no forms of action by which relief can be obtained in respect of such particular rights, and they are consequently left to conscience by the Courts of Law; but being capable of being enforced by proceedings in Equity, and being of a character demanding judicial sanction and interposition, Courts of Equity readily interfere and afford relief. In these cases, therefore, Courts of Equity have exclusive jurisdiction. This, for example, is the case with trusts, for the most part; with the right to relief in many cases of accident, mistake, fraud, pe-

nalties, and forfeitures ; and with the right to protection against anticipated loss or injury. (See St. § '29, 962.)

INTROD.  
SEC. I.  
—

2. There are many other cases in which the kind of relief which is afforded by Courts of Law is inadequate, but in which Courts of Equity can give the precisely appropriate relief. For example, Equity will often enforce the specific performance of a contract ; whereas Courts of Law can only give damages for the breach thereof. (See St. § 30, 33.)

Where equity assumes jurisdiction, on account of the inadequacy of the legal relief ;

There are also cases in which adequate and complete relief could be had at Law ; but in order to obtain it, circuity of action or multiplicity of suits would be necessary ; whereas complete justice can be done by a single suit in Equity. (See St. § 64 k, 496, 621, 853, 854.)

or to avoid circuity of action, or multiplicity of suits ;

Again : Courts of Law cannot do more than pronounce a positive judgment in a settled form, either for the plaintiff or the defendant, irrespective of the peculiar circumstances of the case ; whereas Courts of Equity can adapt their decrees to all the various circumstances which may arise, and can take due care of the rights of all who are in any way interested in the property in litigation. (See St. § 26, 27, 28, 437.)

or to take due care of the rights of all ;

INTROD.

SEC. I.

In these three classes of cases, Equity has a concurrent, and practically an exclusive jurisdiction. Indeed in some, if not in all of the last class of these cases, Equity will assert an exclusive jurisdiction, by granting an injunction against proceedings in other Courts. (See Tit. II. chap. I, *infra*.)

or on account  
of the neces-  
sity for a  
discovery ;

The necessity for a discovery in a Court of Equity furnishes a ground of jurisdiction for relief in a great variety of cases. For the Court, having acquired cognizance of the suit for the purpose of discovery, will frequently entertain it for the purpose of relief. (St. § 691, 692.)

or on account  
of the origi-  
nal denial of  
due relief at  
law ;

And in cases where the Courts of Law originally did not afford adequate relief, Courts of Equity exercise a concurrent jurisdiction, unless prevented by a legislative enactment, although the Courts of Law have subsequently given such relief, because they can have no power to circumscribe the jurisdiction of Courts of Equity. (See St. § 64 i, 81 ; 2 Sp. 16.) If the jurisdiction of the Court of Chancery were necessarily to cease as soon as a Court of Law assumed jurisdiction, it would involve the administration of justice in uncertainty and confusion ; and it might be otherwise extremely prejudicial thereto ; as



the Courts of Law might sometimes entertain suits, where they had not the proper means of investigating 'the truth, or the necessary ability to afford full relief, or to take due care of the rights of all the parties.

INTROD.  
SEC. I.  
—

And so if it is doubtful whether the Courts of Law can give such relief, the Courts of Equity have jurisdiction.

or the doubt-  
fulness of  
obtaining  
such relief.

3. In some cases a matter is most properly cognizable at Law, and Courts of Law could always have afforded due relief, if they had had that evidence which a Court of Equity could obtain. In these cases Courts of Equity possess an auxiliary jurisdiction to provide the Courts of Law with that evidence. (See Title VI. Ch. I. *infra*, and see St. § 64 k, 673.)

Where equity  
has auxiliary  
jurisdiction.

4. Where it is clear that the Courts of Law could always afford adequate relief, without the aid of Courts of Equity, and without circuity of action or multiplicity of suits, and could take due care of the rights of all who are interested in the property in controversy, Equity has no jurisdiction. (See St. § 33, 684 a & c, 686; 1 Sp. 408, 420; 2 Sp. 16.)

Where it has  
no jurisdic-  
tion.

Nor, as already observed, have they any jurisdiction in the cases of those classes of rights which could not be judicially enforced

INTROD. without occasioning a greater general mischief  
 SEC. I. or inconvenience than that which results from  
 — leaving them to be disposed of *in foro con-*  
*scientiæ.*



## SECTION II.

### *Of the General Maxims of Equity Jurisprudence.*

SEC. II. In addition to those maxims which are acted upon as well in Courts of Law as in Courts of Equity, and besides various other maxims which in terms apply to particular parts of the Equity System, there are certain general maxims peculiar to Equity, which it is of the greatest use rightly to understand, and to bear in mind, whether in reading or in practice.

1. No right  
 without a  
 remedy.

I. It is a maxim, that Equity will not suffer a right to be without a remedy. (1 Cru. Dig. X. 1, 50.) It will be evident from the preceding Section, that this lies at the very foundation of a large proportion of Equity Jurisprudence, as a suppletory system. But it will also appear from the observations made in that Section, that this maxim must be regarded as referring exclusively to rights

INTROD.  
SEC. II.  
—

which come within a class of rights enforced at Law, or capable of being judicially enforced without 'occasioning a greater detriment or inconvenience to the public than would result from leaving them to be disposed of *in foro conscientiæ*. And it must also be understood to refer to cases where the party who is remediless at law has not sacrificed or lost his remedy by his own act or laches (see St. § 684 a & c), and where there is no equal or superior adverse right. And there are some exceptive cases of claims of natural justice capable in themselves of being enforced with propriety, but to which neither the Common Law nor Equity give any remedy: as in the case of the exemption at Common Law of the lands of deceased debtors from the payment of debts—an exemption which has been removed by certain statutes, particularly by 3 & 4 Will. 4, c. 104. (See 1 Sp. 417, 174.)

II. But not only will Equity often administer a remedy where the Law will not give any relief, but it will also afford relief, as we have already seen, where the Courts of Law cannot or originally did not clearly give adequate and complete relief, at least without circuity of action or multiplicity of suits, or

2. Equity will administer a due remedy where it cannot or could not be had at law.

INTROD. cannot take due care of the rights of all who  
 SEC. II. are interested in the property in litigation.

3. But equity will not interfere where the courts of law could administer a due remedy.

III. But, as we have also seen, where it is clear that the Courts of Law did always afford adequate and complete relief without the aid of a Court of Equity, and without circuity of action and multiplicity of suits, and could take due care of the rights of all persons interested in the property in litigation, there Equity has no jurisdiction.

Illustration drawn from the case of rents.

Thus, where there was always an adequate and complete remedy at Law for the recovery of rent, either by an action or distress, no suit will be entertained in Equity, although the remedy in Equity may be more beneficial. The cases in which a suit is commonly entertained in Equity for this purpose, are such as stand upon some peculiar Equity; as where the premises out of which the rent is payable are uncertain; or where the time or amount of the payment is uncertain; or where a discovery or an apportionment is wanted; or where the remedy at Law is obstructed or evaded by fraud, or is gone without laches; or where none ever existed; or where it is inadequate, incomplete, or doubtful. (See St. § 684—687.)

4. Equity follows the law.

IV. Although Equity will go beyond the

Law in supplying a remedy in the cases above mentioned, yet it is a well-known maxim, that Equity follows the Law. (See St. § 64 a, b ; 1 Sp. 419, 420.) The reason is, that there may be uniformity of decision. (2 Sp. 359, n. (a).)

INTROD.  
SEC. II.

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The true meaning of this maxim would seem to be, that Equity is governed by legislative enactments and the rules of Law, in regard to legal estates, rights and interests ; and that it is regulated by the analogy of such legal estates, rights and interests, and the legislative enactments and rules of Law affecting the same, in regard to equitable estates, rights and interests, where any such analogy plainly subsists ; if, in each case, there are no peculiar circumstances rendering it absolutely necessary to deviate from this rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favour of another litigant party, and requiring a different course to be taken in the particular case, without overturning or destroying the general application of any legislative enactments or rules of Law that may, in terms or by analogy, apply to the case.

There may indeed be cases in which Equity

INTROD. has followed the Law, even where there have  
 SEC. II. been such peculiar equitable circumstances.  
 But it is conceived that these must be cases in which the Court has (perhaps improperly) declined to exercise the authority which it really possessed and has ordinarily exerted.

To affirm that Equity follows the Law, in any less limited sense than that above pointed out, would be to negative the existence of a large portion of Equity Jurisprudence, if not to assert that there is no such thing as Equity, as distinct from Law. But to affirm that Equity follows the Law, in the restricted sense above pointed out, is merely to assert what is unquestionably true, and most important to be remembered; namely, that Equity will suffer legislative enactments and the rules of Law to govern, and the course of Law to proceed, as far as it can without sacrificing claims grounded on peculiar circumstances which render it incumbent upon a Court of Equity to interpose, in accordance with the maxim previously mentioned, that Equity will not suffer a right to be without a remedy.

Illustration  
 of the maxim  
 in regard to  
 trusts exe-  
 cuted.

In illustration of the maxim, as it applies to equitable estates, rights, and interests, it may be observed that the limitations by which

equitable estates and interests are created by way of trust executed, that is, a trust formally and finally declared by the instrument creating it, are construed in the same manner as similar limitations of legal estates and interests would be construed in a Court of Law; so that, for example, what would create an estate tail in the one case, will create an estate of the same kind in the other case.

But such a constructive assimilation does not always take place in regard to equitable estates and interests created by way of trust executory, which, as opposed to a trust executed, is a trust not formally and finally declared by the instrument creating it, but intended to be so declared by some future instrument. For, in the case of trusts executory, there is often no substantial analogy, forming a ground for such assimilation; because, in many cases, the words are not so much actual limitations, such as those by which legal estates and interests are created, as instructions or intimations as to the mode in which the author of the trust wishes the property to be settled by some future conveyance, settlement, or assurance referred to in the instrument creating the trust; and therefore the words are to be construed ac-

INTROD.  
SEC. II.  
—

Maxim does not apply to trusts executory in all respects.

INTROD.  
SEC. II.

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according to the intent of the party, as presumable from the nature of the case, or from the other parts of the instrument, rather than according to what would be the strict operation of the words, supposing them to be actual limitations contained in a formal and final instrument. (As to these trusts, see Smith's Executory Interests, annexed to Fearne's Treatise, § 489—502, and § 601—637.)

Illustrations  
of the quali-  
fication  
added in the  
writer's  
statement of  
the true  
meaning of  
the maxim.  
Law of pri-  
mogeniture.

In illustration of the qualification that Equity follows the Law only where there are no such peculiar circumstances as above mentioned, it may be observed, that Equity follows the Law in regard to the rule of primogeniture, although that rule, in any particular instance in which it is so followed, may be productive of the greatest hardship towards all the younger members of a large family, who, in one sense, by the operation of the rule, may be left without any sort of provision, whilst the eldest son may be placed in a state of the greatest affluence. But these are not peculiar circumstances creating an equitable right to relief in favour of the younger children against the eldest son, and demanding the interposition of a Court of Equity. The mere absence or want of a



provision, a circumstance arising perhaps from the culpable neglect of the parent, can create no equity against the eldest son. He has the right to the descended or entailed estate, without any reference to the circumstances of the other members of the family; and the mere fact that they have not been provided for by their parent can impose on the eldest son no obligation, in a Court of Equity, to divest himself, and can give the younger children no equitable right to strip him of that provision which the Law has appointed him. No relief could be given in such a case as this, without directly derogating from a rule of Law, which a Court of Equity has no power to do. But if an eldest son should prevent his father from executing a will devising one of his estates to a younger brother, by promising to convey such estate to such younger brother, although that estate would at Law descend to the eldest son, a Court of Equity would doubtless interpose, and prevent the eldest son from asserting any claim to it. (St. § 64.) So Equity will often support the defective execution of powers, where at Law the act would be wholly nugatory. (St. § 64 a.) And in cases under the old Statute of Limitations

Powers.

Statute of  
Limitations.

INTROD. (21 Jac. 1, c. 16), Equity often interfered,  
SEC. II.  
— notwithstanding the time fixed by the Statute  
had expired, where it would have been inequitable to have allowed the Statute to be a bar ; as when a person perpetrated a fraud, which was not discovered till the statutory bar applied at Law ; or where a person carried on an unfounded litigation, protracted so as to subject his adversary to the statutory bar at Law. (St. § 1521 ; 2 Sp. 62.) But, although, in these cases, Equity did not follow the Law, yet it did not overturn or destroy the general application of the enactment. It only refused to apply it in particular instances, where there were peculiar circumstances creating an equitable right to relief, demanding the interposition of the Court in its support, and capable of being enforced without at all derogating from the general application of the enactment in question. So far from derogating from the Statute, Equity was regulated by analogy to the Statute, as to the precise time affixed for asserting equitable titles and claims to which the Statute did not apply. (See St. § 64 a, 1520 ; 2 Sp. 60, 61. And for other illustrations of the qualification of the rule above stated, see St. § 476, 480, and Title II., Chap. III., on Express Trusts, *infra*.)

V. It is a maxim that, *vigilantibus, non dormientibus, æquitas subvenit*: the meaning of which is, that Equity discountenances laches; and, independently of any Statutes of Limitation, has always refused to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. (St. § 959 a, 1284 a, 1520; *Baker v. Read*, 18 Beav. 398; *Wright v. Vanderplank*, 2 K. & J. 1.) Under such circumstances, it would in many cases be impossible to interfere, without doing injustice to third persons who had acquired interests in the property during the intervening period. In general, nothing can call forth a Court of Equity into activity but conscience, good faith, and personal diligence. (2 Sp. 60, 61.)

INTROD.  
SEC. II.

5. *Vigilantibus, non dormientibus, æquitas subvenit.*

VI. Where there is equal Equity, the Law must prevail; in other words, if the defendant has a claim to the protection of a Court of Equity, equal to the claim which the plaintiff has to the assistance of the Court, there the Court will not interpose, but will leave the matter as it stands. It is upon this account that a Court of Equity refuses to interfere against a *bonâ fide* purchaser for a valuable consideration without notice of the

6. Where there is equal equity, the law must prevail.

INTROD.  
SEC. II.

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adverse title, if he chooses to avail himself of the defence at the proper time and in the proper mode. (St. § 64 c, 436 ; 2 Sp. 733 ; *Attorney-General v. Wilkins*, 17 Beav. 285.)

7. Equality  
is equity.

Illustration  
drawn from  
the case of a  
joint pur-  
chase or  
mortgage.

VII. Another maxim is, that Equality is Equity, or, that Equity delighteth in Equality. (St. 64 f.) Acting on this principle, Equity leans strongly against joint-tenancy, as it is attended with the inseparable incident of the right of survivorship. For, although it is true that each joint tenant may have an equal chance of being the survivor, yet this is but an equality in point of chance ; as soon as one dies, there is an end to the Equality between them : on that event the whole accrues to the survivor. And the equal certainty of having an absolutely equal share, or a share proportionate to the amount of the purchase-money advanced by a party, which is an equal share so far as the justice of the case will permit, is considered in Equity far better than an equal chance of having the whole or none of the property purchased. The former is considered to be the true and just equality. And therefore, if two persons jointly purchase, or take a mortgage of an estate, and advance the purchase or mort-

gage money in unequal proportions, on the death of either, of them, Equity, acting on the maxim that Equality is Equity, will hold the survivor a trustee for the representatives of the deceased, as to a share proportionate to the amount of the money so advanced by him. (See St. § 1206.) And this furnishes another illustration of the violation of the terms of the maxim, that Equity follows the Law, though not of the qualified and true sense of that maxim as above explained.

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SEC. II.  
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VIII. Another maxim is, that he who comes into a Court of Equity must come with clean hands. So that if a person seeks to cancel, set aside, or obtain the delivery up of an instrument on account of fraud, and he himself has been guilty of wilful participation in the fraud, Equity will not interpose in his behalf, unless the fraud is against public policy, and public policy would be defeated by allowing it to stand. (See St. § 695.)

8. He who comes into equity must come with clean hands.

Illustration drawn from a fraudulent transaction.

The rule must be understood to refer to wilful misconduct in regard to the matter in litigation, as in the foregoing example, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern.

Qualification of the maxim.

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SEC. II.

9. He who  
seeks equity  
must do  
equity.

IX. It is also a maxim, that he who seeks Equity, must do Equity. (St. § 64 e, 707; 1 Sp. 422.)

The meaning of this is, that he who seeks Equity must do Equity in the transaction in respect of which relief is sought; for the rule does not reach so far as to affect matters not connected with the transaction in respect of which the relief is sought. (*Wilkinson v. Fowkes*, 9 Hare, 595.)

Illustration  
drawn from  
an usurious  
transaction.

To give an illustration of this maxim, a Court of Equity will not set aside an usurious transaction on a bill filed by the borrower, unless upon the terms that he will pay the lender what is *bonâ fide* due to him. It must not be inferred from this, however, that the Court will oblige the borrower to pay what is so due, on a bill filed by the lender to enforce his claim (see St. § 64 e); for that would be contrary to the maxim, that he who comes into Equity must come with clean hands.

10. Equity  
looks on that  
as done,  
which ought  
to be done.

X. It is a maxim, that Equity looks upon that as done, which ought to be done. (2 Sp. 253, *et seq.*) This maxim is acted on in some cases (as in the case of agreements) in favour of persons who have a right to pray that acts might be done, so as virtually

to place them, as near as may be, in the same advantageous position as if those acts had been done in the way in which, and at the time when, they ought to have been performed. (See St. § 64 g; 2 Sp. 264; and see Title II. Chap. VIII. *infra*.)

INTROD.  
SEC. II.  
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As a consequence of this maxim, money directed to be employed in the purchase of land, and land directed to be turned into money, are in general regarded as that species of property into which they are directed to be converted (2 Sp. 256—258), that is, either immediately, or at some given future time, according to circumstances. (2 Sp. 258.) And where the intention in marriage articles is plain, that a conversion should be made, but consents of the parties interested to the actual purchase cannot be obtained as required by the instrument, by reason of their deaths or for some other cause, if any convenient purchase could have been obtained, the Court will take upon itself to judge whether such consents ought to have been given, and the conversion being the paramount object, it will be considered as made. If this were otherwise, the parties to consent would have the option of determining whether the property should be real or personal, which,

Conversion.



INTROD.  
SEC. II.  
—

unless it be clearly given to them, will not be permitted. An equitable conversion of land into money, or of money into land, takes place by force of the direction, notwithstanding the conversion or investment is directed to be made with the approbation of certain parties; and legatees of legacies out of a property directed to be converted with the consent of the tenant for life in writing are entitled to their legacies, whether the property be converted or not; and the residuary legatees of the proceeds are entitled, subject to the legacies, to the estate itself, if not converted. (2 Sp. 260, 261.)

Money devised or contracted to be laid out in land, will pass under a devise of all the testator's messuages, lands, tenements, and hereditaments. (2 Sp. 264.)

Real estate may be so constructively converted as to be liable to legacy duty. (2 Sp. 267.)

The objects of the limitations of property directed to be converted, and those who stand in their place, are entitled to enforce the conversion, either actually or virtually. (See 2 Sp. 268, 269.) But a stranger (such as the Crown or the Lord claiming in default of heirs) is not entitled to call for a conversion. (2 Sp. 266.)



Where money to be converted gets into the hands of the person who is absolutely entitled to it either way, the operation of the rule of conversion will cease. (2 Sp. 270.)

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Where the property is outstanding in a trustee, but there is some person who is absolutely entitled to the property, whether taken as realty or personalty, such person, by any act from which his intention may be collected, may declare his election in what quality it shall be taken. (2 Sp. 271.) Until an election is made, the property passes as if actually converted, and the onus lies on those who would show an election to take it in another character than that it would have if converted. (2 Sp. 272.)

Where one person has a better Equity than another person in respect of the same property, in which each has an interest, the former has a right to call for an assignment or conveyance of the legal estate, and in Equity he will be placed in the same situation as if he had actually obtained a conveyance or assignment. (2 Sp. 728.)

Person having a right to call for an assignment or conveyance, treated as if he had obtained it.

Volunteers, among themselves, have equal Equities; but a volunteer, though a wife or child, has not equal Equity with a bonâ fide purchaser for a valuable consideration, even

INTROD. with notice of the claim of the volunteer.  
 SEC. II.  
 — (2 Sp. 728.)

11. Qui prior  
 est tempore,  
 potior est  
 jure.

IX. As between persons having only equitable interests, if their Equities are in all other respects equal, priority of time gives the better Equity; or, *qui prior est tempore, potior est jure*. But in a contest between persons having only equitable interests, priority of time is the last preference resorted to; *i. e.*, a Court of Equity will not prefer the one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them, or, in other words, that their Equities are in all other respects equal: and if the one has, on other grounds, a better Equity than the other, priority of time is immaterial. (Kindersley, V.C., in *Rice v. Rice*, 2 Drew. 78.)

12. Equity  
 imputes in-  
 tention to  
 fulfil an  
 obligation.

XII. Where a man is bound to do an act, and he does one which is capable of being considered to have been done in fulfilment of his obligation, it shall be so construed, because it is right to put the most favourable construction on the acts of others. (2 Sp. 204.)

Where a dis-  
 tributive

In the case of a covenant, that, on the death

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SEC. II.

of the covenantor, a wife or relative shall receive a gross sum, his or her distributive share, in the case of an intestacy, if equal to or greater than the sum covenanted to be paid, is to be considered as a performance; if less, as a part performance. But where the covenant is, that an annuity shall be paid or secured on the death of the covenantor, the distributive share is not a performance or part performance. (2 Sp. 609.) And where the covenant debt arises in the lifetime of the covenantor (as where he covenants within two years after marriage to pay a certain sum, and he outlives the two years), a distributive share will not be a performance or a satisfaction of the covenant: nor is an orphanage part; for it is not in the father's power. (2 Sp. 609.)

share is a satisfaction of an obligation by covenant.

XIII. It may be observed in this place, that it is a rule, that although the property in controversy be situate in a country out of the jurisdiction of the Court, whether within the English dominions or not, yet the Court, in all cases where the proper parties are within the territorial process of the Court, will afford relief, so far as it can be afforded by proceeding against the persons, and not directly against the property. (See St. § 1290

13. Rules as to foreign or colonial property or contracts.

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SEC. II.

—1300, 1352 a; 2 Sp. 7.) Thus a bill cannot be brought for a partition of land situate in a country out of the jurisdiction; for the Court cannot award a commission there. (St. § 1292; 2 Sp. 8, n. (d).) But a bill may be maintained for an account of the rents and profits of land out of the jurisdiction, or for a specific performance of an agreement respecting such land. (St. § 1291, 1300, 743, 744.) And the Court has gone so far as indirectly to overhaul the judgments of foreign Courts, and even the sales made under those judgments, where fraud has intervened in those judgments, or a grossly inequitable advantage has been taken. (St. § 1294; 2 Sp. 9.)

If a matter is within the jurisdiction of a tribunal of competent jurisdiction in another country the Court of Chancery, except under special circumstances, will leave the matter to be disposed of by that tribunal. (2 Sp. 10.)

The right to personal property follows the domicile, but the right to land or immoveable property is to be determined by the law of the country where it is situate. Yet, if that question is mixed up with others—for instance, with matters of account, which can be more conveniently disposed of here—the

Court will entertain jurisdiction of the whole matter ; giving directions, in cases of need, for instituting any proceedings in the Colonial Courts. (2 Sp. 12.)

The remedy upon contracts must be that which is given by the law of the country where the parties reside. (2 Sp. 14.) But contracts are generally construed according to the law of the place in which they were made ; and, as a general rule, a contract void by the law of the country in which it was made, cannot be enforced here. (2 Sp. 13, 14.)

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## SECTION III.

*Of the Division of Equity.*INTROD.  
SEC. III.  
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The subject of Equity Jurisprudence may be conveniently, and perhaps most properly, treated under the following heads, designated according to the more distinctive characteristics of the relief afforded, or the general objects sought to be effected.

I. Of Remedial Equity, specifically so termed.

II. Of Executive Equity.

III. Of Adjustive Equity.

IV. Of Protective Equity, irrespective of disability.

V. Of Protective Equity, in favour of persons under disability.

VI. Of Auxiliary Equity.

# TITLE I.



Of Remedial Equity,  
Specifically so termed.

## CHAPTER I.

## OF ACCIDENT.

**Definition of accident.** An accident, in the usual sense of the term, is an occurrence not referable to design.

Accident, as remediable in Equity, may be defined to be an unforeseen and injurious occurrence, not attributable to mistake, neglect, or misconduct.

**Illustration in the case of a reduction of stock.**

Thus the reduction by Act of Parliament, of public stock directed by will to be set apart to answer an annuity, is an accident, remediable in Equity by decreeing the deficiency to be made up against the residuary legatees. (St. § 93.)

**I. Accidents remediable at law.**

I. There are many cases of accident in which due relief could always be obtained at Law; and there Equity will not interpose. (St. § 79.)

**II. Accidents not remediable at law or in equity,**

II. On the other hand, there are many cases in which no remedy can be had either at Law or in Equity. (St. § 79.) Thus,

**as in cases of culpability of the sufferer;**

1. No relief will be granted where the accident arose from the gross neglect or fault of the party seeking relief, or his agents. (St. § 105.)



2. And where a person has expressly and absolutely contracted or covenanted to do a particular thing, it is no ground for the interference of a Court of Equity, that he has been prevented by accident from fulfilling his engagement, or from deriving the full benefit of the contract on his side. For he might have prevented any injury to himself from accident, by making proper exceptions; but since he has made no such exceptions, the Law will not conjecturally limit a liability which in terms is general and unqualified. (See St. § 101—104.) So that if a lessee covenants to keep the demised premises in repair, he will be bound to do so, notwithstanding any unavoidable accident by which they are destroyed or injured. (St. § 101.) And where there is a covenant to pay rent during the term, without any exceptions, it must be paid, notwithstanding the premises are accidentally burnt down during the term. (St. § 102.) So if an estate is sold for a certain sum of money and an annuity for the life of the vendor, and the vendor dies before the receipt of any annuity, Equity will not grant relief. (St. § 104.)

TIT. I.  
CAP. I.

or of an absolute agreement,

to repair,

or to pay rent,

or an annuity;

3. Nor will relief be granted in favour of a person whose equitable right to assistance is

or of a countervailing equity;

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CAP. I.

—

not equal, or not more than equal to the equitable right to protection which is possessed by the party against whom the relief is sought. For this reason relief is not given against a *boná fide* purchaser for valuable consideration, without notice (see St. § 108; or against an heir in tail or remainderman in tail in favor of persons claiming under the tenant in tail. St. § 107.)

or of want of  
equity;

4. And so relief will not be granted in favor of a person, who, although a great loser through an accident, has no equitable title to relief, or as little as the person against whom relief is sought. Thus, no relief will be afforded to the legatees or devisees under a will defectively executed (see St. § 105 a, 106); for they, being mere volunteers, have as little Equity as the heir or next of kin, or even less, as it is a maxim that *fortior et æquior est dispositio legis, quam hominis* (Co. Litt. 338 a); and therefore the legal right which has vested in the latter will not be taken away; for the maxim is, that where the Equity is equal, the Law must prevail.

as where a  
will is de-  
fectively  
executed.

III. Acci-  
dents reme-  
diable in  
equity.

III. But where a Court of Law cannot, or, in similar cases, originally could not, or did not, give adequate relief, and take due care of the rights of all persons interested, and the party prejudicially affected is free from

blame in respect of the accident, and has a conscientious title to relief, it will be granted by the Court of Chancery, if it can be granted without derogating from any positive agreement, or violating any equal or superior Equity in another person. (See St. § 28, 64 i, 79, 81, 85, 89, 101, 105, 106, 109.)

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CAP. I.

1. In cases of destroyed, lost, or suppressed deeds, the jurisdiction of Equity, merely to compel a discovery, would seem to be universal, because this was a preliminary assistance peculiar to Equity. And where a discovery only is sought, Equity will grant it without any affidavit of loss; because a person would not file a mere bill of discovery, unless the instrument were really lost.

1. Jurisdiction for discovery in cases of destroyed, lost, or suppressed deeds, and

But, in these cases, the jurisdiction for relief, in addition to a discovery, is of limited extent: for, in some of these cases, Courts of Law have all along been able to administer, and have been in the habit of doing, complete justice. (St. § 83, 84.) And where such relief is sought in a Court of Equity, an affidavit of the fact of destruction, loss, or suppression, must be annexed to the bill; because, in such cases, it is desired to change the forum, from a Court of Law, which, *primâ facie*, is the proper forum, to a Court

jurisdiction for relief in such cases.

Requisites to maintain the jurisdiction for relief in such cases.

TIT. I.  
CAP. I.

—

of Equity; and therefore an affidavit ought to be required, to prevent an abuse of the process of the Court. There must also be an offer of indemnity in the bill, when the nature of the case seems to require it. (See St. § 83; Mitford's Pleadings, Ed. 5, pp. 65, 66.) And in order to maintain the suit, it is further indispensable that the destruction, loss, or suppression, if not admitted by the answer, should be established, at the hearing of the cause, by satisfactory proofs. (See St. § 88.)

Instances in  
which equity  
has jurisdic-  
tion for relief  
in those  
cases.

Among other instances in which Equity exercises jurisdiction for relief in the cases of destroyed, lost, or suppressed deeds, relief will be given in Equity where the plaintiff avers that a deed relating to land has been either destroyed or concealed by the defendant, but he (the plaintiff) knows not whether it has been so destroyed, or whether it has been only concealed: for there a Court of Equity will make a decree, (which a Court of Law cannot,) that the plaintiff shall hold and enjoy the land until the defendant shall produce the deed, or admit its destruction. (St. § 84.)

So if a deed concerning land is lost, and the party in possession seeks a discovery, and to be established in his possession under it, Equity will afford relief. (St. § 84.)

2. A person may also come into Equity for payment of a lost bond; because, until a recent period, no relief was given at Law, on account of the want of a profert. (St. § 81, 82.) And besides, at Law the defendant had not the protection of the oath of the plaintiff to the fact of the loss. Again, it is often proper to grant relief upon the terms of the party giving a bond of indemnity; and a Court of Law could not insist on such a bond as a part of the judgment; and although it has sometimes required the previous offer of an indemnity, yet such an offer may be unsatisfactory in many cases; for, in the mean time, the circumstances of the party to the bond of indemnity may undergo a great change. (St. § 82.)

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CAP. I.

2. Jurisdiction in cases of lost bonds.

3. Courts of Law could always enforce payment of money due on a lost negotiable note or other negotiable unsealed security; because no profert was necessary, and no oyer was allowed of such securities. Courts of Equity, therefore, will not entertain a bill for relief in such a case, unless there is an offer of indemnity in the bill, constituting a ground of jurisdiction. (St. § 85, 86.) And Courts of Equity have no jurisdiction to give relief on account of the destruction of a bill

3. Jurisdiction in cases of lost unsealed securities.

TIT. I.  
CAP. I.

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of exchange, because there was always a complete remedy at law in such cases. (*Wright v. Lord Maidstone*, 1 K. & J. 701.)

4. Relief in cases of the defective execution or non-execution of powers.

4. In the absence of any countervailing Equity, relief will be granted by a Court of Equity, in the case of a defective execution of a mere power, where it is created by an ordinary assurance, and where the defect is not of the very essence of the power, and the defective execution is in favor of a charity, or of persons for whom the donee of the power is under a moral obligation to exercise it, as of a purchaser, a wife, or a legitimate child. And the mere manifestation of an intention to execute the power, provided it clearly appears in writing, will be deemed a defective execution of the power.

But Equity will not interpose in the case of a non-execution of a mere power; for that would be depriving the donee of the right of discretion in regard to the exercise of the power. Nor will Equity support a defective execution of a power, in favor of the donee of the power, or of a husband, father, or mother, or of a grandchild or more remote relation, or of a mere volunteer, except where a strict compliance with the power has been impossible, from circumstances beyond the control of the

TIT. I.  
CAP. I.  

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party; as where the prescribed witnesses could not be found; or where an interested party, having possession of the deed creating the power, has kept it from the party executing the power, so that he could not ascertain the formalities required. Nor can Equity dispense with the regulations prescribed where the power is created by Statute, at least where they constitute the apparent policy and object of the Statute, or with the consent of persons whose consent is required. Nor will an execution by an absolute deed, instead of by will, be supported; as that would be repugnant to the power; since it would not be revocable like a will.

But where the power is coupled with a trust, Equity will grant relief, even in case of the non-execution of the power; because, in this case, the donee was under an equitable obligation to exercise it. (See, as to these propositions respecting powers, St. § 94—98, 169—177; 2 Sugd. Pow. 88—175; and Smith's Compendium of the Law of Property, 586—589.)

## CHAPTER II.

## OF MISTAKE.

Definition of  
mistake.

A MISTAKE, as remediable in Equity, may be defined to be, an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition.

The following propositions appear to be deducible from the cases on the subject :

I. Mistake  
made by the  
sufferer  
alone.

I. Where the mistake is unilateral, and the person suffering through it is the party by whom it was made, relief will not be granted, unless there is some circumstance which gives rise to a presumption that there has been some undue influence, misrepresentation, imposition, mental imbecility, surprise, or confidence abused (see St. § 117—120, 133—135, 137, 138); and even where this is the case, Equity will not interfere as against a *bonâ fide* purchaser for valuable consideration, without notice. (St. § 139, and see Maxim VI. p. 19, *ante*.)



In regard to mistakes in matters of Law, TIT. II.  
CAP. II.  
it is a maxim that *ignorantia legis non excusat*. (St. § 111—113, 116, 138, 140.) But Mistake in a  
matter of  
law.  
where the mistake is one of title, arising from ignorance of a principle of Law of such constant occurrence as to be understood by the community at large, this is considered sufficient to afford such a presumption as above mentioned, so as to entitle the party to relief. (See St. § 121—125, 128, 137.)

And in regard to mistakes in matters of In a matter  
of fact.  
fact, relief will be granted on the same presumption, where the mistake is unilateral, and the fact was material to the act or contract, and was not doubtful from its own nature, and was a fact which would not be ascertained by such diligence or care as is usual in transactions of the like nature, and of which the other party was under a legal obligation to inform the mistaken person. (See St. § 117, 118, 140, 141, 146—148, 150, 151.)

And ignorance of foreign Law is deemed Ignorance of  
foreign law.  
ignorance of fact; because no person is presumed to know foreign Law. (St. § 140.)

But ignorance, on the part of the vendor, Vendor's  
mistake as to  
value.  
of circumstances tending to enhance the value of the property, of which the vendee was aware, will not form a ground for relief,

TIT. II. where it is not a case of mutual confidence.  
CAP. II. (St. § 149.)  
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II. Mutual  
mistake.

II. Where the mistake is mutual, the transaction will be binding, except it was founded in a mutual surprise, or the mistake consists in supposing that the subject-matter of the contract existed when in reality it was not in existence; or the mistake consists in one party supposing that he had purchased something which the other did not intend to sell (St. § 113, 134, 142, 143, a, 144); or the mistake is the result of a miscalculation by the defendant's agent in favor of the defendant. (*Carpmael v. Powis*, 10 Beav. 36.)

III. Compromise of  
doubtful  
rights.

III. In the case of a compromise of doubtful rights, or of rights which are considered by the parties to be doubtful, if all the parties are in a state of mutual ignorance, or they are all acquainted with the doubts which exist in their favor, the compromise will be binding. But where one or more of them is or are not aware of the doubts existing in his or their favor, while the fact that such doubts exist is known to the other or others of them, the compromise will not be binding (see St. § 130, 131, 132; *Lucy's Case*, 4 D. M. & G. 356); because, in that case, there is room for the presumption of surprise or confidence

abused; and the very nature of the transaction made it requisite that all the parties should be on an equality as regards knowledge or ignorance of the doubts existing in their favor. To render a family compromise binding, there must be an honest disclosure, by each party to the other, of all such material facts known to them, relative to their rights and title, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken by either of the parties of the known ignorance of the other of such facts, renders such compromise void in Equity. (*Smith v. Pincombe*, 3 Mac. & G. 659.)

TIT. II.  
CAP. II.

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IV. Where by mistake an instrument *inter vivos* is not what the parties intended, or any acts necessary to give validity to the instrument have been omitted, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by an answer to a bill, Equity will rectify the mistake, (St. § 152, 157, 159, 166, 168, and see Sugd. V. & P. ch. 3, sect. 11, pl. 2, ed. 10, *Meadows v. Meadows*, 16 Beav. 401; *Murray v. Parker*, 19 Beav. 305; *Torre v. Torre*, 1 Sm. & Gif. 518,) except as against a *bonâ fide* purchaser for valuable consideration, without notice,

IV. Correction of a mistake in a written instrument, or in regard thereto.

TIT. II.  
CAP. II.  

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(St. § 165, 2 Sp. 195,) or other person having an Equity equal to that of the plaintiff, (St. § 176,) such as the issue in tail, or a remainderman in tail, where there is no Equity to affect the conscience of such issue or remainderman. (St. § 178.)

But where an instrument is substantially what the parties intended, although it does not carry out their designs, the Court will not rectify the mistake. (St. § 113—115.) A bond to leave or convey property has, however, been sometimes upheld in Equity as an agreement defectively executed. (St. § 136.)

The Court of Chancery will not remedy a defect or supply an omission in a deed in favor of a stranger, where there is no consideration, even in the plainest case, and even when it has arisen from mere mistake, and though the correction would not be inconsistent with the deed. (2 Sp. 886.)

It should be observed, that where the final instrument of conveyance or settlement differs from the preliminary contract, that very circumstance affords of itself some ground for presuming an intentional change of purpose, unless, from some recital in it, or from some attendant circumstances, it appears to have

been intended to be merely in pursuance of the original contract. (St. § 160.)

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If there be articles and a settlement before marriage, as a general rule the settlement alone can be looked to: if it be different from the articles, it must be taken as a new agreement, unless it purport to be executed in pursuance of the articles. If the articles are before marriage and the settlement after marriage, the articles are in effect the binding instrument; and if the settlement gives estates or interests different from those which the Court would give on the construction of the articles, the settlement will be reformed, as between the parties and their representatives and mere volunteers, but not as against a purchaser for valuable consideration. (2 Sp. 140, 141.)

And as regards the admissibility of the evidence, it is a rule of the Common Law, independently of the Statute of Frauds, that parol evidence is not admissible to disannul, substantially add to, subtract from, qualify, or vary a written statement. (See St. § 153, 158; and see also Sugd. V. & P. ch. 3, sect. 8, pl. 2, 33, 36, &c., and sect. 11, pl. 5, ed. 10.) But upon principle it would seem that cases of accident, mistake, and fraud, are (in

TIT. II. many instances at least) to be deemed, in  
 CAP. II. Equity, exceptions to this rule. (St. § 155,  
 ——— 156, 161, notes. Remarks of Sir J. Romilly,  
 M. R., in *Murray v. Parker*, 19 Beav. 308.)

V. Where an instrument is so general in its terms as to release the rights of the party to property, to which he was wholly ignorant that he had any title, and which was not within the contemplation of the bargain, the Court confines the release to what was intended to be released. (St. § 145.)

VI. Equity will relieve where an instrument has been delivered up or cancelled, under a mistake of the party, and in ignorance of the facts material to the rights under it. (St. § 167.)

VII. Equity will also supply defects in the execution of powers, on the ground of mistake, in the cases mentioned in the preceding Chapter under the head of Accident.

VIII. Equity will rectify a clear mistake or omission in a will, if it is apparent on the face of the will. But parol evidence is generally inadmissible. It is admitted, however, in certain cases of mistake in the name or description of a devisee or legatee. (See Jarm. on Wills, 361-3, Ed. 2; Wigram on Wills, 51; *Mostyn v. Mostyn*, 5 Ho. of Lords, 155; St. § 179, 180, 181.)

IX. Equity will grant relief where a mistake in a written contract is fairly presumable from the nature of the transaction. And hence, where there has been a joint loan to two or more obligors, and they are only made jointly liable, the Court will make the bond joint and several. (St. § 162—164.)

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X. An instrument may be entirely set aside on the ground of mistake or fraud. (See St. § 161.) And in cases within the Statute of Frauds, it is an easier matter totally to avoid an agreement, than to vary it; for, in the former case, the Statute of Frauds has no influence whatever; since “it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind.” (Sugd. V. & P. ch. 3, s. 8, pl. 32, ed. 10.)

X. Avoid-  
ance of a  
written in-  
strument on  
the ground of  
mistake.

## CHAPTER III.

## OF ACTUAL FRAUD.

Unsafe to  
define fraud  
*in general*, or  
the extent of  
remedial  
equity on the  
ground of  
fraud.

THE modes of fraud are infinite; and "it has been said, that Courts of Equity have, very wisely, never laid down, as a general proposition, what shall constitute fraud, or any general rule, beyond which they will not go, upon the ground of fraud, lest other means of avoiding the equity of the Courts should be found." (St. § 186.) In accordance with the spirit of this remark, the writer abstains from attempting to give a definition of fraud *in general*. It is usually and accurately divided, however, into two large classes, designated, defined, and treated of under the names of Actual Fraud and Constructive Fraud.

Definition of  
actual fraud.

An actual fraud may be defined to be, something done, said, or omitted, with the design of perpetrating what the party must have known to be a positive fraud.

Jurisdiction  
in cases of  
fraud.

A Court of Equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish a will suppressed by fraud: for,



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in such cases, the proper remedy is exclusively vested in the Ecclesiastical Court, if the estate is personal estate, and in the Courts of Common Law, if the estate is real estate. (St. § 184, and note.) But where the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in unduly obtaining the consent of the next of kin to the probate, Courts of Equity will lay hold of these circumstances to declare the executor a trustee for the next of kin. (St. § 440.)

In a great variety of other cases, fraud is cognizable at Law; as in cases of fraud in the sale of chattels personal: and in some of these cases adequate relief can be, and constantly is, obtained at Law. (St. § 184, and note.) And upon principle, it would seem, that where adequate relief could always be had at Law, and has been ordinarily sought in cases of the same general description to which a particular case belongs, there Equity will not interfere, unless, in the particular case, from the want of evidence, and the inability of a Court of Law to compel a discovery, the fraud could not now, or could not formerly, be established at Law, or unless it is possible that the redress afforded at Law, in cases of the same general description, would not con-

TIT. I.     stitute as ample relief, in the particular case,  
CAP. III.     as that which a Court of Equity could give.

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Lord Hardwicke, indeed, is reported to have said, that Equity "has an undoubted jurisdiction to relieve against every species of fraud." (St. § 184, note.) But where, in a particular case, adequate relief could always be had at Law, and in similar cases relief has been ordinarily sought there, it would seem, upon principle, that the party injured cannot come into a Court of Equity for the identical redress he could have had at Law; for that would seem to be repugnant to the character of the Equity system, and would be resorting to a more complex, tedious, expensive, and objectionable remedy, without any necessity for so doing. It is true, that if the defendant is guilty of the fraud, he has only himself to blame for what he suffers from litigation; but it may turn out that he is not guilty, and therefore, the plaintiff would seem to have no right unnecessarily to involve him in a Chancery suit, when the matter could always have been as effectually and properly dealt with at Law. The true meaning of Lord Hardwicke's remark would seem to be, that where, in any particular case of fraud, the person injured cannot, or could not formerly, obtain adequate

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relief at Law, a Court of Equity has undoubted jurisdiction to give relief, to whatever general description such particular case may belong, even though complete redress may be had at Law in the class of cases within which it comes.

Evidence of  
fraud.

It is a rule as well in Courts of Law as in Courts of Equity, that fraud is not to be presumed. But, on the other hand, neither at Law nor in Equity is positive proof of fraud indispensably necessary. A Court of Equity, however, will act on a lower degree of proof than that which would be required in a Court of Law. (See St. § 190.)

It would be impossible, and unnecessary if it were possible, to enumerate all the different instances in which Courts of Equity will grant relief on the ground of actual fraud. We shall only notice a few of them under these two heads :

Division of  
actual  
frauds.

I. Of frauds which receive that denomination from a consideration of the conduct of the guilty parties, irrespective of any peculiarity in the condition of the injured parties.

II. Of frauds which receive that denomination mainly or in a great measure from a consideration of the peculiar condition of the parties upon whom they are practised.

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I. First class  
of actual  
frauds.

1. Misrepresentation.

I.—1. Wilful misrepresentation, whether by word or deed, constitutes fraud. (St. § 191, 192; *Jennings v. Broughton*, 5 D. M. & G. 126.) Equity will not interfere, however, if the misrepresentation was in a trifling or immaterial point, or if no injury arose from it. (St. § 191, 195, 196, 203; *Pulsford v. Richards*, 17 Beav. 96.) For, in the first case, the evils of litigation would be far greater than the injury occasioned; and, as to the second case, Courts of Equity do not profess to punish guilt, but to redress wrongs. And Equity will not interfere if the party was not misled by the misrepresentation (St. § 202); because, in that case, he was not injured by it. Nor will the Court interpose if the misrepresentation was vague and inconclusive (St. § 192); or if it merely amounted to the common language of puffing and commendation of things sold (St. 201); or if it was, in a matter of opinion or fact, equally open to the inquiry of both parties, and in regard to which neither could be presumed to trust the other (St. § 191, 197, 198); or if the party injured may properly impute the loss to a want of ordinary care or discretion on the part of himself or his agents. (St. § 199, 200 a; but see *Reynell v. Sprye*, 1 D. M. & G. 656, 710.) For the Court does not sit to

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redress injuries which the injured parties, by ordinary and proper care, could have prevented. It is no part of Equity Jurisprudence to encourage carelessness.

Misrepresentation is a ground of relief, whether the party who made the assertion or intimation knew it to be false, or made it without knowing whether it were true or false. (St. § 193; *Pulsford v. Richards*, 17 Beav. 95.)

2. If a person conceals facts and circumstances which he is under some legal or equitable obligation to communicate to the other, it amounts to a fraud for which Equity will grant relief. (St. § 204, 207, 215, 217—220; 2 Sp. 765; *Pulsford v. Richards*, 17 Beav. 94—6.) As, if a vendor sells an estate, knowing that he has no title to it, or that there are incumbrances on it, of which the purchaser is ignorant (St. § 208); or if the insured does not communicate to the underwriter all facts and circumstances which increase the risk. (St. § 216.)

2. Concealment.

But a purchaser is not bound to communicate his knowledge of the value of the property to the vendor (St. § 207, note); for it is the business of the vendor to know and sufficiently to estimate the worth of his own property. Thus, if A., knowing that

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CAP. III.  
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there is a mine in the land of B., of which he knows B. to be ignorant, should conceal his knowledge of the fact, and enter into a contract to purchase the estate of B. for a price which the estate is worth without considering the mine, the contract would be good. (St. § 205.)

In many cases, the maxim *caveat emptor* is applied; and unless there is some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the purchaser is bound, notwithstanding there may be material intrinsic defects in it, known to the vendor, and unknown to the purchaser. (St. § 212.)

*In foro conscientiae*, each party is bound to communicate to the other his knowledge of all material facts, not discoverable by the other, or of which he knows the other to be ignorant. For this is required by the golden maxim, that we should do unto others as we would that they should do unto us. But if Equity were to attempt to enforce the observance of so broad a rule, a far greater inconvenience would ensue than that which is now experienced. For it would often be a matter of doubt with the party wronged, whether the other was really aware of the defect or ad-

vantage which he did not disclose. And, frequently, that could only be ascertained from his admissions or denials in a suit. So that, in order to determine this, a bill seeking relief against fraud would often be filed in total uncertainty as to the existence of that knowledge, which was of the very essence of the supposed fraud, and absolutely necessary to be proved before any ground for relief could be said to exist. And in many cases there would be the same difficulty in ascertaining whether the defect or advantage, admitting it to be known to the one party, was or was not disclosed by him to the other.

To draw a distinction which would, perhaps, give as much effect to the principle of sound morals, as would be compatible with avoiding frequent and fruitless litigation and the encouragement of carelessness and negligence, the true course would seem to be, to hold that Equity will grant relief, if a person does not disclose any material fact, which from the nature of the case, he must have known, and which the other party could not be expected to discover with the care ordinarily used in similar transactions.

3. Mere inadequacy of price, or any other

3. Inadequacy.

TIT. I.  
CAP. III.



TIT. I. inequality in the bargain, does not constitute  
CAP. III. by itself a ground to avoid it. (St. § 244;  
*Abbott v. Sworder*, 4 De G. & S., 448.)  
For the value of things is always fluctuating,  
and dependant on numberless circumstances.  
Besides a man may be induced by difficulties or exigences, or for other reasons, to part with his property at a particular time, for less than that for which another would have sold it. (St. § 545.) And perhaps the lowness of the price may have been the only inducement to the purchaser to make the purchase; and he may have simply accepted the proposals of the vendor, instead of being the originator of the transaction, or of being actively concerned in negotiating it, like a man whose design is to gain a fraudulent advantage over another.

Still, however, there may be such an unconscionableness or inadequacy in the bargain, as to shock the conscience, and amount to conclusive evidence of imposition or some undue influence: and in such a case, Courts of Equity will interfere on the ground of fraud. And where there are other ingredients of a suspicious nature, gross inadequacy must furnish the most vehement presumption of fraud. (St. § 246.) As, if proper time for deliberation is not allowed the party



TIT. I.  
CAP. III.  
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injured; if he is importunately pressed; if those in whom he placed confidence make use of strong persuasion; if he is suddenly drawn into an act, without being fully aware of the consequences; if he is not permitted to consult disinterested friends or counsel, before he is called upon to act, in circumstances of sudden emergency or unexpected right and acquisition (St. § 251); or if the grantor is an illiterate person, and advantage has been taken of his necessities. (*Cockell v. Taylor*, 15 Beav. 103, 115.) But Equity will not relieve where the parties cannot be placed *in statu quo*. Thus such relief will not be given in the case of marriage settlements; inasmuch as the Court cannot unmarry the parties. (St. § 250.)

4. Where gifts and legacies are bestowed on persons, on condition that they shall marry with the consent of parents, guardians, or other confidential persons, Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraudulent, corrupt, or unconscientious refusal of the parties whose consent is required to the marriage. (St. § 257.)

4. Refusal of consent to a marriage.

II. With regard to frauds which receive that denomination mainly or in a great mea-

II. Second class of actual frauds.

TIT. I. sure from a consideration of the peculiar con-  
CAP. III. dition of the injured parties—

1. On persons  
of unsound  
mind.

1. In the case of contracts or other acts, however solemn, of persons who are idiots, lunatics, or otherwise of unsound mind, wherever, from the nature of the transaction, there is not evidence of entire good faith, or it is not seen to be just in itself, or for the benefit of those persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests. But where there is entire good faith, and the contract or other act is for the benefit of such persons, as to provide them with necessaries, there Courts of Equity will uphold it, as well as Courts of Law. (St. § 227—229.)

2. On intoxi-  
cated per-  
sons.

2. If a person, at the time of entering into a contract or doing an act, was so excessively drunk as to be deprived of the use of his understanding; or if there was any contrivance or management to lead him to drink, or some unfair advantage taken of his intoxication; Courts of Equity will not lend their assistance to the person who obtained an agreement or deed from him, when so intoxicated, but will assist him in getting rid of it, on account of the fraud of the other party in obtaining such agreement or deed from a person

in such a state or by such means. (See St. TIT. I.  
CAP. III.  
§ 230, 231, 232.)

3. The contracts and other acts of persons who are of weak understanding will be held void in Equity, if the nature of such contracts or other acts justifies the conclusion that the party has been imposed on, circumvented, or over-reached by cunning, artifice, or undue influence. (St. § 234—238.) 3. On persons of weak understanding.

4. Where a party is not a free agent, and is not equal to protect himself, a Court of Equity will protect him. Hence, Equity will relieve against acts done under duress, or under the influence of great terror or of threats. And it watches with the utmost jealousy all contracts made by a party while under imprisonment; and if there is the slightest ground to suspect oppression or imposition, it will set the contract aside. And, in like manner, circumstances of extreme necessity and distress may so entirely overpower free agency, as to justify the Court in setting aside a contract on account of some oppression or fraudulent advantage attendant on it. (St. § 239.) 4. On persons who are not free agents; but under duress, or in fear.  
or imprisonment,  
or extreme necessity.

5. Infants may, even at Law, bind themselves by contracts for necessities suitable to their degree and quality, or by acts which the 5. On infants.

TIT. I. Law requires them to do. (St. § 240.) But,  
CAP. III. in general, where a contract may be either  
— for the benefit or to the prejudice of an infant, he may avoid it, as well at Law as in Equity. Where it can never be for his benefit, it is utterly void. (St. § 241.)

## CHAPTER IV.

## OF CONSTRUCTIVE FRAUD.

CONSTRUCTIVE frauds are acts, statements, or omissions, which operate as virtual frauds on individuals, or, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish or evil design, or may amount, in the opinion of the party chargeable therewith, to nothing more than what is justifiable or allowable. Definition.

The cases which will be noticed in the present Chapter, may be arranged in four classes. Four classes of constructive frauds.

I. Relief is granted, on the ground of constructive fraud upon public policy, against agreements, provisions, and transactions, which, although they may not operate as frauds upon individuals, would, if generally permitted, be prejudicial to the welfare of the community. Thus, I. Frauds on public policy.

1. Marriage brokerage contracts, which are 1. Marriage brokerage contracts.

TIT. I.  
CAP. IV.

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agreements whereby a party engages to give another a remuneration, if he will negotiate a marriage for him, are void, as tending to introduce matches which are ill-advised, and not based on mutual affection, and therefore against public policy. And they are so utterly void, that they are deemed incapable of confirmation; and money paid under them may be recovered back again, in a Court of Equity, whether the marriage is an equal or an unequal one. (St. § 260—263.)

2. Agree-  
ments to in-  
fluence tes-  
tators.

2. The same rules are applied to bonds and other agreements entered into as a reward for using influence over another, to induce him to make a will for the benefit of the obligor (St. § 265); for such contracts encourage a spirit of artifice and scheming, most prejudicial to the moral tone of those in whom it exists; and they tend to deceive and injure others.

3. Contracts  
to facilitate  
marriages.

3. On a similar ground, secret contracts made with parents, or guardians, or other persons standing in a peculiar relation to a party, whereby, on a treaty of marriage, they are to receive a remuneration for promoting the marriage or giving their consent to it, are held void. (St. § 266, 267.)

4. On the other hand, a contract or condition is void, if it is expressly in restraint of marriage generally, or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally (see St. § 274, 276—283; *Lloyd v. Lloyd*, 2 Sim. N. S. 255): as, that a woman shall not marry a man who has not an estate of 500*l.* a year (St. § 280), or shall not marry till 50 years of age, or shall not marry any person residing in the same town, or any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation (St. § 283). A condition, however, to marry or not to marry a particular person, or not to marry under the age of 21 years, or without consent of parents or trustees or other persons specified, or that a widow shall not marry, is good in the case of real estate, or a charge on real estate, or things savouring of the realty. But when such a condition is a condition subsequent annexed to a bequest of personal estate, and there is no bequest over, it is then treated as merely *in terrorem*, and the legacy is absolute. (St. § 284—289.) Whether the same rule applies to a condition precedent is uncertain. (See St. § 290.) An exception, however, occurs in the case of the wife of the testator:

TIT. I.  
CAP. IV.

4. Contracts or conditions in restraint of marriage.

TIT. I. for the law recognizes in the husband such  
CAP. IV. an interest in his wife's widowhood, as to  
— make it lawful for him to restrain her from  
making a second marriage, by means of a  
condition subsequent. (*Lloyd v. Lloyd*, 2  
Sim. N. S. 263 (a).)

In regard to those conditions precedent, which are void on account of the generality of their restraint on marriage, no estate will vest in the event of non-compliance, in the case of real property; but in the case of a legacy of personal property, the legacy will be held good and absolute, as if no condition had been added. (St. § 289.)

5. Contracts  
or conditions  
in restraint  
of trade.

5. So, contracts and conditions in general restraint of trade are void, as tending to discourage industry, enterprise, and just competition. But a person may be restrained from carrying on trade in a particular place, or with particular persons, or for a reasonable limited time. And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret. (St. § 292.)

6. Fraud in  
relation to a  
bill in parlia-  
ment.

6. Where, pending a railway bill in parliament, an agreement is entered into to

(a) As to special limitations in restraint of marriage, see the writer's "Compendium on the Law of Real and Personal Property," 59—61.



produce a false impression, or to mislead or suppress inquiry, or to withdraw public opposition thereto, it will be held void as a fraud upon parliament, as well as upon the public at large. (St. § 293 a.)

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CAP. IV.

7. Contracts for the buying, selling, or procuring of public offices are void, as tending to introduce into public offices persons who are unfit for them in respect of character and other qualifications. (St. § 294, 295.)

7. Contracts  
for public  
offices.

8. So are agreements for the suppression of criminal prosecutions (St. § 294), as tending to weaken the beneficial preventive influence of the Law, by diminishing the certainty of punishment.

8. Suppres-  
sion of cri-  
minal pro-  
ceedings.

9. So are contracts which have a tendency to encourage champerty (St. § 294; *Reynell v. Sprye*, 1 D. M. & G., 660), and agreements, bonds, and securities founded on corrupt considerations, that is, on the commission of what is contrary to the moral or municipal Law, or on the evasion thereof. (St. § 294—297.)

9. Champerty  
and corrupt  
considera-  
tions.

Wherever any contract or conveyance is void, either by a positive Law or upon principles of public policy, it is deemed incapable of confirmation; it being a maxim, *Quod ab initio non valet, in tractu temporis non conualescit*. But where it is merely void-

Distinction  
between void  
and voidable  
transactions  
as regards  
confirmation.

TIT. I. able or turns upon circumstances of undue  
 CAP. IV. advantage, surprise, or imposition, there, if  
 — it is deliberately and upon full examination  
 confirmed by the parties, it will be valid.  
 (St. § 306.)

II. Frauds  
 in the case of  
 persons in  
 the confi-  
 dential rela-  
 tions of—

II. Where a reasonable confidence is re-  
 posed in another person, or a peculiar influ-  
 ence is possessed by him in consequence of  
 standing in a confidential relation, and he  
 makes use of that confidence or that influ-  
 ence to obtain an advantage to himself at  
 the expense of the party confiding in him  
 or under his influence, he will not be per-  
 mitted to retain any such advantage, how-  
 ever unimpeachable the transaction would  
 have been, if no such confidence had been  
 reposed, or no such confidential relation had  
 existed. Thus,

1. Parent, or  
 person stand-  
 ing *in loco*  
*parentis*.

1. Contracts and conveyances whereby  
 benefits are secured by children to their  
 parents, or to persons who stand *in loco*  
*parentum*, if not entered into with scrupulous  
 good faith, and reasonable, under the cir-  
 cumstances, will be set aside, unless third  
 persons have acquired an interest under  
 them. (St. § 309; *Hoghton v. Hoghton*, 15  
 Beav. 278; *Espley v. Lake*, 10 Hare, 260;  
*Wright v. Vanderplank*, 2 K. & J. 1.)

2. During the existence of guardianship, the relative situation of the parties occasions a general inability to deal with each other. TIT. I.  
CAP. IV.  
 2. Guardian.  
 And Courts of Equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, if the intermediate period is short; especially if all the duties attached to the office have not ceased, or if the estate still remains in some sort under the control of the guardian; unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most absolute good faith on the part of the guardian. (St. § 317—320; *Wright v. Vanderplank*, 2 K. & J. 1.)

But when the guardianship has entirely ceased, and a fair and full settlement of all transactions growing out of it has been made, and a sufficient time has intervened to allow the ward to feel completely independent of the guardian; there is then no objection even to a bounty being conferred upon the latter. (St. § 320.)

3. The same principles are applied to persons standing in the relation of quasi guardians or confidential advisers. 3. Quasi guardians or advisers. (St. § 319.)

4. If an attorney contracts with or takes a bond from a person who at the time is his 4. Attorney.

TIT. I. client, he is subject to the *onus* of proving  
 CAP. IV. the perfect fairness of the transaction; as the  
 — relation between the parties must give rise to  
 great confidence in the attorney, or to very  
 strong influence over the client. (St. § 310—  
 313; *Holman v. Loynes*, 4 D. M. & G. 270.)  
 And a gift made to an attorney *pendente lite*  
 will be set aside. (St. § 312.)

5. Doctor. 5. Similar considerations apply to cases of  
 a medical adviser and his patient. (St. § 314.)
6. Agent. 6. An agent will not be permitted to reap  
 any advantage by becoming secret vendor or  
 purchaser of property which he is authorized  
 to buy or sell for his principal. (St. § 315.)  
 So that if an agent sells his own property to  
 his principal, as the property of another,  
 without disclosing the fact, the bargain, at  
 the election of the principal, will be held  
 void. And if an agent employed to purchase  
 for another purchases for himself, he will be  
 considered as the trustee of his employer.  
 (St. § 316; *Bentley v. Craven*, 18 Beav. 75.)  
 And in all transactions directly and openly  
 entered into between principal and agent, the  
 utmost good faith is required; so that the  
 agent must not conceal any facts within his  
 knowledge which might influence the judg-  
 ment of his principal as to price or value.  
 (St. § 315, 316 a.)

7. To guard against the danger of any advantage being taken by a trustee, and to remove all temptation from him, he is never permitted to obtain any profit or advantage to himself in managing the concerns of his *cestui que trust*, but whatever benefits or profits are obtained will belong to the *cestui que trust*. And he is not allowed to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid if it were a case of guardianship. (St. § 321, 322.) And where a purchase has been made by a trustee of the estate of his *cestui que trust*, although at a public auction, the *cestui que trust*, without showing any essential injury, may, in general, if he pleases, insist upon trying the experiment of another sale. (St. § 322; 2 Sp. 943, 944.)

8. In order to prevent the temptation of availing themselves of information for their own benefit, and concealing it from those for whom they act, the same restriction on the right of purchase applies to other persons standing in similar confidential situations; as to counsel, agents, commissioners of bankrupts, assignees and solicitors of a bankrupt or insolvent's estate, auctioneers, and credi-

TIT. I.  
CAP. IV.

7. Trustee.

8. Counsel,  
agents, com-  
missioners of  
bankrupts,  
assignees,  
and solicitors  
of a bankrupt  
or insolvent,  
auctioneers  
and cre-  
ditors.

TIT. I.   tors, who have been consulted as to the sale.  
CAP. IV.   (St. § 322; 2 Sp. 943.)

9. Executor  
or adminis-  
trator.

9. And it may be laid down as a general rule with regard to executors or administrators, that they will not be permitted, under any circumstances, to derive a benefit from the manner in which they transact the business of their office. (St. § 322.)

10. Debtor,  
creditor, and  
surety.

10. Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety, or if he omits to do any act of duty when required by the surety, and that act or omission may prove injurious to the surety, or if a creditor enters into any stipulations with the debtor, unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such contract as a defence to any suit brought against him, if not at Law, at all events in Equity. So that if a creditor stipulates with his debtor, in a binding manner, upon a sufficient consideration, to give further time for payment, without the consent of the surety, the latter will be discharged in Equity, if the arrangement might be injurious to him. (St. § 324, 325, 326, 883, 883 a, note.) But a conditional agreement for further time does not discharge

the surety, when, from the agreement not being performed, the agreement does not become binding. (St. § 883 a, note.) Mere delay on the part of the creditor, at least if some other Equity does not intervene, unaccompanied with any valid contract for such delay, will not amount to laches, so as to discharge the surety. (St. § 326.) But the sureties are entitled to come into a Court of Equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt. (St. § 327, 639.)

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CAP. IV.

III. Relief will be granted in favour of those classes of persons, of whom, from their peculiar circumstances, irrespective of any mental incapacity, undue advantage may readily be taken, even where the transaction could not be impeached if entered into by parties otherwise situated. Thus,

III. Frauds  
in case of  
persons pec-  
uliarly  
liable to be  
imposed on.

1. Bargains with expectant heirs, who were in difficulties at the time, will be set aside, unless the party can show that a fair consideration was paid, or that the bargain was fully made known to and approved by the person to whose estate the expectant heir hoped to succeed; because it is the policy of Equity to prevent designing men from taking

1. Bargains  
with expect-  
tant heirs,



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CAP. IV.  
—

advantage of persons whose interests are future, and therefore apt to be under-estimated or improvidently disposed of, especially by the necessitous, the thoughtless, and the young; and it is also the object of Equity to discourage transactions by which the intentions of the ancestor or other person from whom the property was expected are disappointed, and, by cutting off relief at the hands of strangers, to oblige the heir to disclose his difficulties at home. (See St. § 334—340, 343.)

and remain-  
der-men and  
reversioners.

The same relief is afforded to remainder-men and reversioners, who were in difficulties at the time of the bargain, unless the party who dealt with them can show that a fair consideration was paid, or that the bargain was fully made known to and approved by their parents or other persons standing *in loco parentis*, who had the means of obviating the necessity of such an alienation of their future interests. (See St. § 334—340.)

If the father or other person standing *in loco parentis* were unable to relieve the expectant, the concurrence of the former would seem insufficient to give validity to the bargain; for, although in this case the expectant would not be without the counsel of a person in whom he could confide, yet he would still



be under the pressure of difficulties ; and the existence of such difficulties might well induce the father or other person standing *in loco parentis* to acquiesce in a transaction which appeared to be unavoidable, however hard and unconscientious the terms thereof might be.

TIT. I.  
CAP. IV.  
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If the heir or other expectant, after being relieved from his necessities, absolutely and deliberately, and on full information as to his right of setting aside the bargain, confirms the transaction, or does any act by which the rights or property of the other party are injuriously affected, he will not be allowed to repudiate the bargain. (St. § 345, 346.)

2. On similar principles post-obit bonds and other securities of the like nature are set aside, when made by heirs and other expectants. A post-obit bond is an agreement made, on the receipt of money by the obligor, to pay a sum exceeding the sum so received and the legal interest thereof, on the death of the person upon whose decease he expects to become entitled to some property. (St. § 342.) Even the sale of a post-obit bond at a public auction will not give it validity, unless the sale was free, fair, and with the ordinary precautions and advertisements. (St. § 347.) If,

2. Post-obit  
bonds, &c. by  
expectants.

TIT. I.  
CAP. IV.

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however, these contracts are perfectly fair in other respects, relief will not be granted, except upon the terms of paying that to which the lender is equitably entitled. (St. § 344.)

3. Sales to expectants at exorbitant prices.

3. Where tradesmen and others have sold goods to young and expectant heirs, at exorbitant prices, and under circumstances indicative of imposition, or of undue influence, or of an intention to connive at profuse expenditure, unknown to their parents or other persons standing *in loco parentis*, Equity has cut down the claim to a just amount. (St. § 348.)

4. Common sailors.

4. Common sailors, being so extremely generous, credulous, and improvident a class of men, that they require guardianship all their lives, Equity treats them in the same light as young expectant heirs; and relief is generally afforded against contracts respecting their prize money or wages, wherever any inequality appears in the bargain, or any undue advantage has been taken. (St. § 332.)

IV. Virtual frauds on individuals, irrespective of any confidential relation, or any peculiar liability to imposition.

IV. Where something is said or done, or some omission is made, which operates as a virtual fraud upon an individual, but may have been nothing more than mere neglect, unconnected with any selfish or evil design, or may amount, in the opinion of the party,

to nothing more than justifiable artifice, or to a fair attempt to obtain a reasonable advantage, or to an allowable act, statement, or omission, of some other kind, relief will be granted on the ground of constructive fraud. Thus,

1. Where a person, by some act, statement, or omission, knowingly produces a false impression on another, who is misled and injured thereby, whether beneficially to the former party or not; and such act, statement, or omission, when rightly considered, is contrary to plain moral duty or good faith, but yet may have been nothing more than mere neglect, unconnected with any design, either to injure another or to benefit the party who is guilty thereof, in such case the latter alone, even though an infant or married woman, shall suffer thereby, on the ground of constructive fraud. (See St. § 384—390; 2 Sp. 575, 576.) As where a person, knowing himself to be the owner of property, permits another to sell it, as his own, to a third person, who purchases under the supposition that the vendor has a good title, the real owner will not be allowed to assert his title to it. (St. § 385, 389.) And where a person, aware of the existence of an instrument

TIT. I.  
CAP. IV.  
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1. Misleading.

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CAP. IV.  
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under which he might reasonably have supposed that he took some interest, neglects to make proper inquiries as to the fact, and encourages a stranger to deal with another person respecting property in which he himself is interested under such instrument, he will be bound by the transaction. (See St. § 387.)

2. Frauds on  
auctions.

2. Agreements whereby parties agree not to bid against each other at an auction, especially where the same is directed or required by Law, are held void. For such agreements may cause the property to be sold at an undervalue, and thereby injure the party interested in the proceeds of sale ; and they have a tendency to prejudice the character and value of auctions in general. (See St. § 293.) On the other hand, if underbidders or puffers are employed at an auction to enhance the price, and other bidders are thereby misled, the sale will be void. (St. § 293.)

3. Uncon-  
scientious  
use of the  
Statute of  
Frauds.

3. As the Statute of Frauds was designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. And hence, where, from any circumstances which may have resulted from fraud, a contract has not been reduced

into writing as it ought to have been, it will be enforced against the party who is chargeable with the omission, in case he attempts to shelter himself behind the provisions of the Statute. (See St. § 330.)

TIT. I.  
CAP. IV.  
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4. If clandestine marriage contracts are designed to impose on parents, or persons standing *in loco parentis*, or in some other peculiar relation to the parties, so as to disappoint their bounty, or to defeat their intentions in the disposition of their property, such contracts will be set aside, or the equities will be held the same as if they had not been entered into. (See § 275.)

4. Clandestine marriage contracts.

5. So, relief will be granted to the injured parties, where persons, after doing acts required to be done on a treaty of marriage, render those acts virtually unavailing, by entering into other secret agreements, or derogate from those acts, or otherwise commit a fraud upon a marriage. (See St. § 268—272.) As where a parent declines to consent to a marriage, on account of the intended husband being in debt, and the brother of the latter gives a bond for the debts, to procure such consent; and the intended husband then gives a secret counter-bond to his brother, to indemnify him against the first

5. Frauds on marriages.

TIT. I.  
CAP. IV.

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bond. (St. § 269.) So, where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much as was insisted on, and the sister gave a bond to the brother to secure the repayment thereof, the bond was set aside. (St. § 270.) So where upon a treaty of marriage, a creditor of the intended husband concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was prevented from enforcing his debt. (St. § 271.) And where a father, on the marriage of his daughter, enters into a covenant, that on his death he will leave her a full and equal share of all his personal estate, he cannot afterwards transfer a portion of his personal property to another child, retaining the annual income thereof for his life. (St. § 382.)

6. Frauds on  
marital  
rights or ex-  
pectations.

6. Relief will also be granted against acts secretly done by a woman in contravention of the marital rights, or in disappointment of the just expectations of her intended husband. As where a woman, in contemplation of marriage, and without the privity of her intended husband, makes a settlement to her

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CAP. IV.

separate use, or a conveyance in favor of persons for whom she is under no moral obligation to provide. But a reasonable provision for her children by a former marriage, under circumstances of good faith, is free from objection. (St. § 273; 2 Sp. 505.)

7. It has been determined, that by the Common Law and the Statute 13 Eliz. c. 5, if a person makes a conveyance of any property which is liable to the payment of debts (unless it is for valuable consideration and *bonâ fide*, to a person who has no notice of a fraudulent intent), and at the time, or immediately afterwards, he is indebted to such an amount that he has not ample means available to pay the debts, such conveyances are fraudulent and void as against the creditors, to the extent to which it may be necessary to apply the property conveyed in payment of the debts. (See St. § 352—374, 381; 2 Sp. 887; *Scarf v. Soulby*, 1 Mac. & Gord. 364; *Re Magawley's Trust*, 5 De Gex & Sm. 1; *Barton v. Vanheythusen*, 11 Hare, 126.)

7. Frauds  
under the  
stat. 13 Eliz.  
c. 5.

8. If any creditor, who is a party to a composition deed, has, unknown to the other creditors, obtained any benefit or security, either from the debtor or a third person,

8. Frauds on  
creditors.



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CAP. IV.  
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beyond what the others have received, or enters into a contract with the debtor which prevents him from being put into that situation of freedom from existing demands, which may be considered as one of the chief inducements to the others to sign the deed, it is a fraud on the policy of the law; and such secret arrangements are entirely void, even as against the assenting debtor, or his sureties, or his friends; and money paid under them may be recovered back. (See St. § 378, 379; 2 Sp. 357—360.)

So an agreement between an insolvent debtor and his assignee, by which the estate of the insolvent is to be held in trust, to pay certain annuities to the insolvent, and to apply the surplus to the extinction of a debt to the assignee, will be rescinded, even at the instance of the insolvent himself. (St. § 380.)

9. Mortgage  
or convey-  
ance with  
notice of  
another's  
title.

9. Where a person takes a mortgage or a conveyance, with full notice of the legal or equitable title of other persons to the same property, his own title will be postponed and made subservient to their title (St. § 395, 396), except in cases within the Stat. 27 Eliz. c. 4. (See p. 84, *infra*.)

Thus, if a person takes a mortgage of property, knowing that it was subject to an



equitable mortgage made by deposit of the title-deeds, the notice of the equitable mortgage will raise a trust in him to the amount of the equitable mortgage. (St. § 395.)

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Notice is attended with the same consequence even where the property lies in a register county. For, the object of the Registration Acts being only to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances, if a subsequent purchaser or mortgagee has notice, at the time of his purchase or mortgage, of any prior unregistered conveyance or mortgage, he will not be permitted to avail himself of his title against the prior conveyance or mortgage, any more than he would if the same were registered. (St. § 397; 2 Sp. 763.)

Notice may be either actual, or constructive, *i. e.*, imputed by construction of law. (2 Sp. 754.) Actual notice, to constitute a binding notice, at least where it depends on oral communication only, must be given by a person interested in the property, and in the course of the treaty. (2 Sp. 753.)

As regards constructive notice, whatever is sufficient to put any person of ordinary prudence on inquiry, is constructive notice of

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every thing to which that inquiry might have led. (2 Sp. 755—760.) And hence a purchaser is presumed to have knowledge of the instrument under which the party with whom he contracts, as executor, or trustee, or appointee, derives his power. (St. § 400.) But the mere registration of a conveyance is not deemed constructive notice to subsequent purchasers, as to collateral effects; so that the mere registration of a second mortgage will not prevent a prior mortgagee from tacking a third mortgage, when he had no actual notice of the existence of the second mortgage. (St. § 401, 402; 2 Sp. 763.) To constitute constructive notice, it is sufficient if it is brought home to the agent, attorney, or counsel, in the same transaction, or in one immediately preceding. (St. § 408; 2 Sp. 760, 761.) And where the mortgagor has at different times employed the same solicitor in effecting different incumbrances upon the same estate, and the incumbrancers have employed the mortgagor's solicitor in the several transactions, each of the puisné incumbrancers is affected with notice of the prior incumbrances. (2 Sp. 761.)

A purchaser with notice of a lien, incumbrance, trust, or any other claim, except that

of dower, may protect himself by purchasing the title of another *bonâ fide* purchaser without notice; for otherwise the latter would not enjoy the full benefit of his own unexceptionable title. And if a person who has notice sells to another, and the latter has no notice and is a *bonâ fide* purchaser for a valuable consideration, the title will not be affected with notice in his hands; for otherwise no man would be safe in any purchase. (See St. § 409, 410; 2 Sp. 764.)

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10. Purchases from executors, of the personal property of their testator, are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside. (St. § 422, 423, 580, 581.)

10. Fraudulent dealing with executors or administrators.

11. The object of the Statute 27 Eliz. c. 4, being to give full protection to subsequent purchasers against voluntary prior conveyances, a prior conveyance is deemed void, as

11. Frauds under the stat. 27 Eliz. c. 4, in the case of voluntary deeds, as against sub-

TIT. I.  
CAP. IV.  
—  
sequent purchasers or mortgagees.

against a subsequent purchaser or mortgagee, whether with or without notice, and even after a bill filed to enforce such prior conveyance, if not on valuable consideration, although it may be *bonâ fide* and on good consideration, or although it may be expressed to be made for divers valuable considerations, not naming them, on the ground that the Statute, in every such case, infers fraud, and will not suffer the presumption to be rebutted. As between the parties themselves, however, such conveyances are binding. And as between two voluntary conveyances, if the first is fraudulent, the second will prevail; but, where each is *bonâ fide*, Equity will not interfere. (St. § 425, 426, 433; 2 Sp. 288, 638; *Kelson v. Kelson*, 10 Hare, 386; *Barton v. Vanheythusen*, 11 Hare, 126.) Nor will Equity interfere, where the voluntary grantee has conveyed to a *bonâ fide* purchaser for valuable consideration, before the *bonâ fide* purchaser from the voluntary grantor acquired his title (a). (St. § 434.) And Equity will not give its aid to a voluntary settlor to enable him to complete a contract for sale against a purchaser. (2 Sp. 289.)

(a) For examples of the mode of relief in cases of fraud, see St. § 437—439.

There is this exception to the general rule, TIT. I.  
CAP. IV.  
in the case of a charity, that if a purchaser has notice of a gift to a charitable use, he takes subject to it, though, if he has no notice, he will have the same protection as in the case of an ordinary voluntary conveyance. (2 Sp. 289.)

A fair voluntary settlement in favor of a wife and children is also an exception to the rule to this extent, that almost any *bonâ fide* consideration, in addition to the meritorious consideration of the provision itself, will be sufficient for the purpose of supporting the settlement. Therefore if a person whose concurrence the parties deem essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything. (See 2 Sp. 288, 290; Sugd. Concise View, 568—9.)

And if the wife's estate is settled on her for life, for her separate use, with remainder to the husband, with remainder to the children, such a post-nuptial settlement is good against a mortgagee of the husband and wife; because the surrender by the husband of his right to receive the rents and profits during the coverture, and his giving his wife an exclusive

TIT. I. power over them, is a valuable consideration.  
 CAP. IV. (*Hewison v. Negus*, 16 Beav. 594.)

A collateral relation who is the object of an ulterior limitation in a settlement, is not a mere volunteer; for, though he may not be within the consideration of the marriage, he is within the contract; but yet it has been held that he cannot prevail against a purchaser. (2 Sp. 291—293.)

A conveyance for payment of debts generally, to which no creditor is a party, and in which no particular debt is expressed, is a fraudulent conveyance within the statute. (2 Sp. 351.)

12. Frauds in the case of voluntary gifts, as against the donors themselves.

12. In every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary, if the transaction be called in question, that he should be able to establish that the person giving him the benefit did so voluntarily and deliberately, and with full knowledge of what he was doing: if this is not established, the transaction will be set aside. (*Cooke v. Lamotte*, 15 Beav. 241.)

## TITLE II.



Of Executive Equity.

## CHAPTER I.

## OF LEGACIES AND PORTIONS.

*Jurisdiction.* No suit will lie, at the Common Law, to recover legacies, unless the executor has assented to them (St. § 591); because all the chattels vest in him, and are liable to the payment of the testator's debts, and it is the duty of the executor, before he pays, delivers over, or assents to the legacies, to see whether there will be sufficient left to pay the debts, inasmuch as a man must be just before he is permitted to be generous. (See 2 Blac. Com. 512.) But after the executor has assented to a specific legacy of chattels, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof. A similar rule has been attempted to be applied at Law to pecuniary legacies, but the application has been doubted and disapproved of (St. § 591); because Courts of Law could not impose on the parties recovering these legacies, such terms as might be required; so that, for example, a husband



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CAP. I.  

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might recover a legacy given to his wife, without making any provision for her or her family. (St. § 592.) If the legacy is of a chattel personal, or is payable out of personal estate, and the executor has not assented, and the legacy is not the subject of a trust express or implied, the legatee may enforce his claim in the Ecclesiastical Court, if that Court can take due care of the interest of all parties. But the jurisdiction of that Court is very rarely exercised in legatory matters; and, in the case supposed, the Common Law Courts, as already observed, have no jurisdiction; so that, practically speaking, the Courts of Equity have exclusive cognizance of such cases. And where there is an actual trust, express, implied, or constructive, or the legacy is charged on land, or the other Courts cannot take due care of the interests of all parties, Courts of Equity will assert an exclusive jurisdiction. And even where the executor has assented to the legacy, and there is no actual trust, yet they have jurisdiction, though it may be merely a concurrent jurisdiction; because the executor is considered as a kind of trustee for the legatees, which forms a universal ground of equitable interference; and because the interposition of a Court of

**TIT. II.** Equity may be required to obtain a discovery,  
**CAP. I.** account, or distribution of assets, or some  
 other relief or assistance which the other  
 Courts are or were incompetent to afford.  
 (See St. § 593—602.)

Legacy to a  
 married  
 woman.

Thus, if a legacy is given to a married woman, and her husband sues for it in the Ecclesiastical Court, a Court of Equity will grant an injunction; because the Ecclesiastical Court has no authority, like that of a Court of Equity, to require him to make a suitable settlement on her and her family. (St. § 598.)

Legacy to an  
 infant.

So where legacies are given to infants, Courts of Equity have exclusive jurisdiction; because they can give proper directions for securing and improving the fund, which the Spiritual Courts have no power to do. And indeed, in these cases, it would be proper for the executor to resort to a Court of Equity, to procure suitable indemnity for the payment of the legacy, and security to refund in case of a deficiency of assets. St. § 600.)

Legacy pay-  
 able at a  
 future day.

So in cases of legacies payable at a future day, whether contingent or otherwise, Courts of Equity will compel the executor to give security for the payment thereof; or, which is the modern and perhaps the more appro-

priate practice, it will order the fund to be paid into Court, even if there is not any actual waste or danger of waste. (St. § 603.)

TIT. II.  
CAP. I.

And where a specific legacy is given to one for life, and after his death to another, there the legatee in remainder can obtain a decree for security from the tenant for life, for the due delivery over of the legacy to the remainder-man, if there is some allegation and proof of waste or of danger of waste. But, in the present day, if there is no such allegation and proof, the remainder-man is only entitled to have an inventory of the property which was bequeathed to him, so that he may be enabled to identify it, and to enforce a due delivery of it, when his right of present possession accrues. (St. § 604.)

Specific  
legacy to one  
for life, re-  
mainder to  
another.

Generally speaking, when a future period of distribution among children is contemplated by the will or other instrument, all who shall be born during the life of the parent, or until the period of distribution shall arrive, will be entitled to share. (2 Sp. 418.)

What chil-  
dren to be  
included.

If a legacy is given for a particular purpose, the fact that it cannot be effected will not prevent the legacy from vesting in the donee. (2 Sp. 466, note (c).) So that if a

Legacy for a  
purpose  
which cannot  
be accom-  
plished.

TIT. II. bequest be to or in trust for a legatee, to  
 CAP. I. apprentice him or the like, it is an absolute  
 — gift to the legatee; and if he die before it be  
 so applied, it will belong to his representa-  
 tives. (2 Sp. 462.)

What is a  
 portion.

In the case of a parent, a legacy to a child is presumed to be a portion, although it be not so expressed, because it is the duty of a parent to provide for his child. The duty which is imposed upon the parent may be assumed by any other person, who for any reason thinks proper to put himself in that respect in the place of the parent; and when it is so assumed, the same presumption will arise as in the case of a legacy or gift by a parent. There are many doctrines which are applicable to portions, that is, sums of money secured or given by a parent or person standing *in loco parentis* to a child, which would not be applied to a gift as between strangers. (2 Sp. 394.)

Where por-  
 tions or  
 legacies are  
 not to be  
 raised.

If portions or legacies charged on land are made payable on an event personal to the party to be benefited, and such party die before that event happen, the portion or legacy is not to be raised out of the land. But it is otherwise if the payment be postponed until the happening of an event not

referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid. (2 Sp. 396.)

TIT. II.  
CAP. I.

Where a portion is secured, and no particular time is fixed for the vesting, if the child should die before that time when the portion is needed, the portion shall not be raised: for it is reasonable that the land should be eased of the charge, when the only motive for making the same is at an end. (2 Sp. 398.)

If there is a limitation to the parent for life, with a term to raise portions at twenty-  
Time for raising portions.  
 one or marriage, and the interests are vested, the portions must be raised forthwith by sale or mortgage of the reversionary term, unless there is something to indicate an intention that the portions should not be raised until the term falls into possession. (2 Sp. 405.)

When a legacy is given by a father, or  
Interest.  
 person standing *in loco parentis*, as a provision for an infant, and no maintenance or interest is given, though the legacy be payable at a future day, the infant has an immediate right to interest. (2 Sp. 409; 2 Rop. Leg. 1257, 1270, 1348, Ed. 4.)

TIT. II.  
CAP. I.

Construction  
of provisions  
for "younger  
children."

When real estate is so settled as that it must on the death of a parent go to his eldest son, and provision is made, not by a stranger or relation not standing *in loco parentis*, but by that parent, or by any person standing *in loco parentis*, whether by prenuptial settlement or by will, for the younger children of such parent or person, the Court has considered the presumption, that it was intended to make provision for all the children, and not to give a double portion to any, to be so strong, that it has let in all children unprovided for by the settlement or will itself or by means which were in contemplation of the parties making the settlement or will, though not strictly "younger," and has excluded the child provided for by the family estate, even though a younger child. (2 Sp. 411—413.) This latitude of construction is not extended to a legal limitation in a deed. (*Ib.* 412.) In ordinary cases, the period of distribution and not the period of vesting, is the time for ascertaining who is to be excluded. (*Ib.* 416.)

Construction  
of legacies.

In deciding on the validity and interpretation of purely personal legacies, Courts of Equity implicitly follow the rules of the Civil

Law, as recognised and acted on in the Ecclesiastical Courts; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the Common Law. (St. § 602, 608.)

TIT. II.  
CAP. I.  

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With these few remarks, we must dismiss the subject of Legacies and Portions, as a separate topic, since it is so extensive, that the doctrines of Equity respecting it could not be even succinctly stated, without far transgressing the limits allotted to the present Manual.

## CHAPTER II.

## OF DONATIONES MORTIS CAUSA.

**Jurisdiction.** COURTS of Equity maintain a concurrent jurisdiction in all cases of this kind, where the assistance afforded at Law is not adequate or complete. (St. § 606.)

**Definition.** A *donatio mortis causâ* is a gift of personal property made by one who apprehends that he is in peril of death, and evidenced by a manual delivery by him or by his direction, to the donee or some one else for the donee, of the property itself, or of the means of obtaining possession of the same, or of the writings by which the ownership thereof was created, and conditioned to take effect absolutely in the event of his not recovering from his existing disorder, and not revoking the gift before his death. (See St. § 606, 607 a—607 c ; 1 Sp. 196 ; 2 Sp. 912.)

Such donations sometimes enforced as trusts. The doctrine no longer prevails, that where a delivery, from the nature of the thing delivered, will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causâ*.



On the contrary, it is now established that Courts of Equity will treat the delivery of the instrument by which the property was created, as constituting a trust for the donee, to be enforced in Equity. (St. § 607 c.) So that negotiable notes, bills of exchange, bank notes, cheques, bonds, and mortgages, may be the subject of such donations; and goods in a warehouse may be given in like manner by a delivery of the key. (St. § 607 a; 1 Sp. 196; 2 Sp. 657; *Bouts v. Ellis*, 17 Beav. 121.)

A donation of this kind partakes partly of the characteristics of a gift *inter vivos*, and partly of those of a legacy. It differs from a legacy in these respects: 1. It takes effect *sub modo* from the delivery in the lifetime of the donor; and therefore it cannot be proved as a testamentary act in the Ecclesiastical Courts. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos* in certain respects in which it resembles a legacy: 1. It is revocable during the donor's lifetime. 2. It may be made to the wife of the donor. 3. It is liable to the debts of the donor on a deficiency of assets. (St. § 606 a; 1 Sp. 196.)

TIT. II.  
CAP. II.  
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Mixed character of such donations.

TIT. II. Words of absolute gift, if accompanied by  
CAP. II. expressions showing that the intention was  
that the property should be enjoyed only in  
the event of the death of the donor, will be  
sufficient to constitute a *donatio mortis causâ*.  
(2 Sp. 912.)

By what  
words  
created.

## CHAPTER III.

OF EXPRESS PRIVATE TRUSTS EVIDENCED  
BY SOME WRITTEN DOCUMENT.

I. A TRUST, when used in the sense of an equitable interest, is not now, as it was at one time, considered a chose in action; it is a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the possessory and legal ownership thereof. (See Smith's Executory Interests, annexed to Fearn, § 44—46, 50; 2 Sp. 875.)

I. Definition of a trust.

II. Trusts arising under wills are exclusively within the jurisdiction of Courts of Equity. (St. § 1058.) And indeed this is the case with most matters of trust. (St. § 962.)

II. Extent of jurisdiction over trusts.

III. Trusts may be divided into three kinds: express trusts, implied trusts, and constructive trusts. The last two, however, are frequently confounded, or at least classed together, and are sometimes designated by the name of implied trusts, and sometimes by the name of constructive trusts.

III. Division of trusts.

TIT. II.  
CAP. III.

IV. Definition of an express trust.

V. Mode of declaration of trust.

IV. An express trust is a trust which is clearly expressed by the author thereof, or may fairly be collected from a written document.

V. The Statute of Frauds requires all declarations of trust of freehold, copyhold or leasehold lands, tenements, or hereditaments, to be evidenced by some writing signed by the party declaring the same. But declarations of trust of money secured on real estate or of chattels personal need not be so evidenced. (St. § 972; 1 Sp. 497, 498; 2 Sp. 19, 20, 897.)

A declaration of trust, if *bonâ fide*, is valid, though at a distance of time, and even after the trustee has committed an act of bankruptcy. (2 Sp. 21.) And if the signed document refers to any other document, which shows what was meant by the parties, that is sufficient. (2 Sp. 22.) And if the terms of the trust do not sufficiently appear upon the face of the instrument, evidence may be received to show the position of the party signing, and the circumstances by which he knew himself to be surrounded, and the credibility of the instrument. (2 Sp. 22.)

It is not necessary that there should be any actual transfer of property to render a

declaration of trust effectual. If a person declares himself to be a trustee for another of money or personal property to be recovered, whether in writing or by acts or declarations of a decisive and definite nature sufficiently proved, the transaction will be binding against him and his representatives. (2 Sp. 897.) And if a person, by writing or by word, directs his debtor to hold the money due in trust for a third person, and such direction is communicated to the debtor and the donee, an effectual trust is created in favor of the donee. (2 Sp. 53, 898.) But a defective conveyance or assignment, without valuable consideration, where the party means actually to vest the *legal* ownership in the donee, or in any other person as trustee for him, will not be considered as a declaration of trust. (2 Sp. 57, 886.)

VI. Where uses are expressly and clearly limited, which the Statute of Uses will not execute, that is, convert into legal estates, trusts are thereby created; for modern uses, unexecuted by the Statute are trusts, just as all uses were trusts before the Statute was made. And where uses are engrafted on uses, the Statute only executes the first use; so that where an estate is limited to A. and his heirs, to the use of B. and his heirs, to

TIT. II.  
CAP. III.

VI. By what  
words a trust  
may be  
created.

TIT. II. the use of or in trust for C. and his heirs, the  
 CAP. III. Statute executes the use to B. and his heirs;  
 — but the use to C. and his heirs is not executed by the Statute, but is a trust. Nor does the Statute execute uses or trusts where it is requisite that the trustee should continue to hold the estate in order to perform them. Nor does the Statute extend to uses or trusts of chattels real or personal; the words of the Statute being, "when any person is *seised* to the use," &c., and the word "*seised*" being inapplicable to personal estate. And trusts of copyholds were excluded from the operation of the Statute, because otherwise the rights of Lords would have been infringed. (See St. § 970; 1 Sp. 466, 490.)

No particular form of expression is necessary to the creation of a trust. (1 Sp. 498; 2 Sp. 20.) And a trust may be created although there may be an absence of any expressions in terms importing confidence. (*Page v. Cox*, 10 Hare, 169.)

There are many cases, arising under wills, in which it is very difficult to determine whether or not a trust was intended to be created. It may, however, be laid down as a general rule, that expressions of recommendation, confidence, hope, wish, and desire, are considered to create trusts, if the object

and the property which is to form the subject of the supposed trusts, are certain and definite, and if, regard being had to the whole context and circumstances of the will, the subject-matter, the previous conduct of the testator, the situation of the parties, and the probable intent, the expressions appear to have been intended to be imperative; and expressions showing a desire that an object should be accomplished, will be deemed imperative, unless there are plain express words or there is a necessary implication that the testator did not mean to exclude a discretion to accomplish the object or not, as the party may think fit. But if either the object or the subject is not definite; or if a discretion and a choice to act or not is given; or if the prior disposition of the property imports an absolute ownership, as where it is given without any fetter in a former part of the will; or if the motive assigned is beneficial to the donee; or if the words which contemplate a benefit to a third person appear to be expressive of the motive by which the testator was actuated, rather than of a trust in favor of such person; as where a legacy is given to A., the better to enable him to maintain his children; no valid trust will be created by words of this character. (St. § 1069, 1070,

TIT. II.  
CAP. III.  
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TIT. II. and notes; 2 Sp. 64—71; *Briggs v. Penny*, 3  
 CAP. III. Mac. & Gord. 546; 2 Rob. Leg. 1446; *Thorp*  
 — v. *Owen*, 2 Hare, 607; *Macnab v. Whitbread*,  
 17 Beav. 299; *Reeves v. Baker*, 18 Beav.  
 372.) And any words by which it may be  
 expressed, or from which it may be implied,  
 that the first taker may apply any part of the  
 subject to his own use, are held to prevent  
 the subject of the gift from being considered  
 certain, and a vague description of the object,  
 that is, a description by which the giver  
 neither clearly defines the object himself, nor  
 names a distinct class out of which the first  
 taker is to select, or which leaves it doubtful  
 what interest the object or class of objects is  
 to take, will prevent the object from being  
 certain within the meaning of the rule. (St.  
 § 1070, note; 2 Sp. 69, 72, 78; *Green v.*  
*Marsden*, 1 Drewry, 646.) But where in  
 terms or in effect a gift is made to a parent  
 for or towards the support of himself and  
 children, the mere fact that the parent may  
 apply part of the property for his own sup-  
 port does not render the subject uncertain so  
 as to prevent the disposition from being con-  
 strued to create a trust in favor of his chil-  
 dren. It is only an uncertainty which the  
 Court can remove by ascertaining, if neces-



sary, what should be devoted to the children. (2 Sp. 463—465.) Again, the family of A. will often be a sufficient designation of the objects; for the context may render it definite, and show that it means the heir at law of A. or, in other cases, the children of A., or, in others, the brothers and sisters or next of kin of A., according to the Statutes of Distribution. Generally speaking, neither the husband nor the wife will be considered as included under the word “family.” Although the term “relations” is still more indefinite, the Court has executed a trust in favor of relations, by giving the property, when personal, to the next of kin according to the Statutes of Distribution, but *per capita*. (St. § 1071; 2 Sp. 73—76.) But where a testator devised his leasehold estates to his brother A. for ever, “hoping he would continue them in the family,” this did not create a trust; for the words gave a choice, and the object was not definite. (St. § 1072; 2 Sp. 75.) And where a testator bequeathed to his wife all the residue of his personal estate, “not doubting but that she will dispose of what shall be left at her death to his two grandchildren;” these words did not create a trust, because the property would be uncertain;

TIT. II.  
CAP. III.

TIT. II. for it might be just what she chose to leave.  
CAP. III. (St. § 1073.)

VII. Donee  
excluded  
from taking  
beneficially,  
if trust was  
intended,  
though not  
valid.

VII. But it sometimes happens that although no valid trust is created, yet it is clear that a trust was intended; and in such instances the party to whom the gift is made is as completely excluded from taking beneficially as if a valid trust were created. This is the case where the words are directly or indirectly imperative, but the objects are too indefinite, or are not pointed out at all, or not in such a way that the Court can take judicial notice of them. (St. § 979 a, b; *Briggs v. Penny*, 3 Mac. & Gord. 546.)

VIII. Trusts  
executed and  
executory.

VIII. Express trusts are either executed or executory, in the sense of directory. A trust executed is a trust which appears to be finally declared by the instrument creating it. A trust executory or directory is a trust raised either by a stipulation or by a direction, in express terms or by necessary implication, to make a settlement or assurance to uses or upon trusts which are indicated in, but do not appear to be finally declared by the instrument containing such stipulation or direction. (Smith's Executory Interests, annexed to *Fearne*, § 489; 2 Sp. 128, 129, 131, 132, 133; *Turner v. Sargent*, 17 Beav. 203.)

In the case of trusts executed, a Court of Equity puts the same construction on technical words as that which is put by a Court of Law on limitations of legal estates. But in the case of trusts executory, Equity considers the apparent intent, to be collected from the whole instrument, or, where the language is doubtful, the presumable intent, rather than the strict import of technical words. (See 2 Sp. 131—135.) Thus, where the legal estate is limited to one for life, remainder to the heirs male of his body, he takes an estate tail male under the rule in *Shelley's case*. And where, in a *will* or *voluntary* deed, there is a mere direction to settle an estate on one for life, to be followed by a remainder to the heirs of his body, as there is nothing of an inchoate or executory nature in the instrument itself, and the words are formal and explicit, and there is nothing in the instrument to show or afford a presumption that the words were not intended to be used in their technical sense, the mere reference to a further instrument does not render the trust executory, and therefore the limitations, as regards the rule in *Shelley's case*, receive the same construction as similar words used in limiting legal estates. But if

TIT. II.  
CAP. III.

TIT. II. *marriage articles* express that an estate is to  
 CAP. III. be settled on the husband for life, with remainder to the heirs of his body, there the inchoate nature of the instrument, combined with the allusion to a further instrument, renders the trust executory; and as the issue in this case are purchasers for valuable consideration, so Equity will construe the articles as giving an estate for life only to the husband, with a remainder in tail male to the children. (2 Sp. 136.)

IX. Trusts governed by same rules as legal estates.

IX. Trusts in real property, which are exclusively cognizable in Equity, are generally governed by the same rules as legal estates. (1 Sp. 492, 499, 500, 502, 875, 876, 878.)

Exceptions.

But, 1. The construction put upon trusts executory, as we have before seen, differs, in some respects, from that which prevails in regard to legal estates and trusts executed. 2. Before the late Act of Dower, Courts of Equity held that they were not subject to dower; because, before the question was tried, it was the general opinion that, by the creation of a trust estate, dower was prevented from attaching; and it is a maxim that, *communis error facit jus*; and to have held that trust estates were subject to dower, would have affected a large proportion of the es-

tates in the kingdom. (1 Sp. 501.) 3. An equitable estate, being incapable of livery of seisin and of every form of conveyance which operates by the Statute of Uses, a mere declaration of trust, if in writing signed by the party bound or his agent lawfully authorized, was held sufficient to transfer such equitable estates; except that a fine or recovery was required, where the same would have been necessary if the estate had been a legal estate. (See St. § 974, 974 a, and notes, and § 975; 1 Sp. 497, 500, 506, 877; and as to executory trusts, see pp. 14, 15, 106, *supra*.) In practice, however, trust estates have been usually conveyed in the same manner as legal estates. (1 Sp. 506.) 4. Trusts were independent of the rules of the Common Law founded on tenure: so that a life interest in a trust estate was not forfeited on any alienation by the tenant for life. (1 Sp. 500, 505.)

X. Long terms for years are often created for securing the repayment of money lent on mortgage, and for other purposes. Prior to the Statute 8 & 9 Vict. c. 112, such terms did not determine on the mere performance of the trusts for which they were created, unless there was a special provision to that effect; but the legal interest remained in the trustee,

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CAP. III.

X. Trusts of  
terms.

TIT. II. after they were performed; and at Law the  
CAP. III. term continued to be a term in gross, as distinct and separate from the inheritance as it was at first. But in Equity the term might become attendant on the inheritance by express declaration, so as to follow the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed or by will or by act of Law, and so as not to be devisable, before the late Act of Wills, without the formalities requisite for devising real estate, and, in short, so as to be governed in Equity by the same rules generally as the inheritance. Again, a satisfied term might become attendant on the inheritance, with the same effects, by mere implication; for, as Equity always considers who has the right to the land in conscience, if the term was not subject to any ulterior limitation to which the inheritance was not subject, and the owner of the inheritance was entitled to the whole trust of the term, it was attendant on the inheritance by implication.

In consequence of satisfied terms being deemed terms in gross at Law, but capable of being rendered completely subservient to the ownership of the inheritance in Equity,

they were often made of the greatest use in protecting the inheritance from mesne estates, charges, and incumbrances. Thus, if a *bonâ fide* purchaser for valuable consideration, mortgagee, lessee, or other incumbrancer, took a conveyance, lease, or assignment, defective by reason of some estate, charge, or incumbrance, subsequent to the creation of a long satisfied term for years and prior to his own conveyance, lease, or assignment, and of which he had no notice at the time of his contract, he might effectually protect himself against all persons claiming under such prior estate, charge, or incumbrance, by taking an assignment of the satisfied term to a trustee for himself, or by taking an assignment thereof to himself, where he took the conveyance, lease, or assignment of the estate or interest to be protected in the name of a trustee; for he might use the legal estate in such satisfied term, to defend his possession during the continuance of the term; or, if he had lost the possession, to recover it. (See St. § 998—1002, and notes; Sudg. Conc. View, 477.)

By the Stat. 8 & 9 Vict. c. 112, § 1, it is enacted, that every satisfied term of years which, either by express declaration or by

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construction of law, shall upon the thirty-first day of December, one thousand eight hundred and forty-five, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, one thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every Court of Law and of Equity to be a subsisting term. And, by § 2, it is enacted, that every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, one thousand eight hundred and forty-five, and which, either by express declaration or by construction of Law, shall after that day become attendant upon the inheritance or re-



version of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

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An attendant term might at any time be disannexed by the proper acts of the parties in interest, and be turned into a term in gross, when it failed of a freehold to support it, or was divided from the inheritance by different limitations from those of the latter. (St. § 1002.)

A trust term may be conveyed as well as devised so as to give successive interests to successive takers; whereas a legal term can only be devised in that manner. (1 Sp. 513.)

XI. A person in whose favor a trust has been created may affirm it, and enforce the performance thereof, although it was created without his knowledge, if at least it is not revoked by the author of the trust before it is so affirmed. (St. § 972.)

XI. Trusts created without *cestui que trust's* knowledge.

XII. Equity will enforce a trust where it is executed, or where it is raised by will, even though it is a mere voluntary trust: but it will not enforce an executory trust raised by a covenant or agreement, unless it is supported by a valuable consideration. (See

XII. What trusts will be enforced.

TIT. II. cases referred to, St. § 793, 793 a ; 2 Sp. 52,  
CAP. III. 57, n. (e), 129, 255. And as to the distinction  
— between executory and executed, see *supra*,  
p. 106.)

XIII. Exe-  
cution of  
marriage  
articles.

XIII. Marriage articles will be specifically executed on the application of any person within the scope of the consideration of the marriage, or of those claiming under any such person. But they will not be specifically executed on the application of persons who are volunteers, even of a wife or child by a subsequent marriage ; although where the bill is brought by persons who are within the scope of the consideration, or by those claiming under them, Courts of Equity will decree a specific execution throughout, as well in favor of the mere volunteers, as of the plaintiff ; as they either execute them *in toto*, or not at all. (St. § 986, 987 ; 2 Sp. 287.)

XIV. As-  
signments  
for benefit of  
creditors.

XIV. Putting the bankrupt and insolvent laws out of the case, a person is at liberty to assign all his property for the benefit of his creditors, though it may be for the purpose of defeating some particular creditor of his execution in an action commenced by him against the debtor. For a debtor in securing the equal distribution of his effects among all his creditors is only performing a moral duty.

But such an assignment must be free from fraud and misrepresentation. (2 Sp. 350, 352.)

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Preferences and priorities of particular creditors are ordinarily valid, in general assignments made by debtors in discharge of their debts, except under the laws of bankruptcy and insolvency. (St. § 1036; 2 Sp. 350, 351, 352.) But a debtor cannot vest his property in one of his creditors for the purpose of hindering and delaying his other creditors, and compelling them to come to terms; for such a deed is fraudulent and void. (*Smith v. Hurst*, 10 Hare, 30.)

Assignees under general assignments, such as assignees in cases of bankruptcy and insolvency, take only such rights as the assignor or debtor had at the time of the general assignment; and consequently a prior special assignee will hold against them, without giving notice of his assignment. (St. § 1038.)

In order to entitle the creditors named in a general assignment for the benefit of creditors to take under it, it is not necessary that they should be technical parties thereto, unless they are named in the assignment as parties, and are expressly required to execute before they can take under its provisions. It is sufficient if they have notice of the trust in their

TIT. II. favor, and assent to it; and if there is no  
CAP III. stipulation for a release or any other condition in it which may not be for their benefit, their assent will be presumed, till the contrary appears. (St. § 1336 a.) Until, however, the creditors have assented to the trust, and given notice thereof to the assignee, an assignment of this kind in which the creditors are not parties and have not executed, is deemed revocable by the debtor, in Equity as well as at Law, whether the creditors are individually named or not. (St. § 1036 b.)

Where creditors have acted under a deed of composition, and treated it as valid, the Court of Chancery will also act under it and treat it as valid, as against the assignor, though the creditors have not executed it within the time prescribed. (2 Sp. 354.)

Where there is an assignment to two trustees, and one assents, and the other dissents, the property passes to the assenting trustee, (2 Sp. 351.)

XV. Revocableness of a consignment or remittance.

XV. In those cases where a consignment or remittance is made, with orders to pay over the proceeds to a third person, the appropriation is not absolute, but revocable at any time before the third person has assented thereto, and notice of the same has

been given to the mandatory ; for it amounts to no more than a mandate from a principal to his agent. And it will be revoked by any disposition inconsistent with the execution of the mandate. But after such assent and notice, the third person may avail himself of it in Equity, without any reference to the assent or dissent of the mandatory ; for his receipt of the property binds him to follow the order of his principal. (St. § 1045, 1046.)

Where a person executes and delivers a deed of conveyance of equitable property to a volunteer, or where the legal estate is transferred and a trust of it is declared in favor of a volunteer, and there is nothing upon the face of the transaction or from contemporaneous evidence to show that it was intended to be revocable, it cannot be revoked or avoided in any way. And even if the donor should procure a re-transfer of stock by the trustees, and where it is in writing, should cancel the instrument, and by will make a provision for the same *cestuis que trust*, the settlement will be binding ; and unless the subsequent provision be expressed to be substitutionary, the *cestuis que trust*, if the gift be not by way of portion, will take both ; but they will have their election, if it be ex-

TIT. II.  
CAP. III.

Revocable-  
ness of a  
conveyance  
of equitable  
property or a  
declaration  
of trust in  
favor of a  
volunteer.

TIT. II. pressed to be in substitution. Stock not being  
CAP. III. within the Stat. 27 Eliz., a purchaser from the  
donor cannot avoid the voluntary settlement  
or gift. (2 Sp. 882—883.)

The keeping in the donor's possession a deed so executed as to pass the estate, is not of itself sufficient to enable the donor to revoke it by cancellation or by will, for the estate having passed, it would require the active interference of the Court of Chancery to revest the estate; and it is no ground for such interference that the act was foolishly or inconsiderately done. (2 Sp. 885.)

XVI. Effect of a direction or power to raise money out of rents for debts, &c. or of a charge.

XVI. Where a will contains a direction or power to raise money out of the rents and profits of an estate, to pay debts or portions, &c., and the money must be raised and paid without delay, Courts of Equity have so construed those words as to give a power to raise by sale or mortgage, unless restrained by other words. (St. § 1064, 1064 a; 2 Sp. 316.)

And where a testator, by his will, charges his real estates with the payment of debts generally, and then devises the same estates to trustees, in trust for other persons, the trustees have authority to sell or to mortgage

the real estates, or a part thereof, for the payment of the debts. (St. § 1064 b.)

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CAP. III.

XVII. Where real property is devised to be sold for, or is charged with the payment of definite and ascertained sums only, and such payment is to take place at the time when the required amount is to be raised, the purchaser of such property is bound to see that the purchase money is applied in the fulfilment of the trust, unless expressly exempted by a provision by the author of the trust. But where the property sold constitutes the natural and primary fund for the payment of debts generally, or is expressly charged with, or conveyed or devised for the payment of debts generally, and therefore, in order to ascertain the sums to the payment of which the property is liable, it would be necessary for the purchaser to institute proceedings in Chancery, or where the purchaser, if bound to see to the application of the money, would be involved in a trust of long continuance; there, the purchaser, unless he has notice that there are no debts, or notice of fraud, is not bound to see to the application of the purchase money. (See St. § 1126, 1127, 1128, 1130—1134.)

XVII. Obligation of purchaser to see to the application of the purchase-money.—General rules.

In illustration of these rules, it may be

Specific points in



TIT. II.  
CAP. III.

illustration  
of the above  
rules as to  
the pur-  
chaser's  
obligation.

observed, that as the personal estate, whether consisting of chattels personal or of chattels real, is liable at the Common Law, and constitutes the natural and primary fund for the payment of the debts of the testator generally, the purchaser of the whole or of any part of it, without notice that there are no debts, or that the sale was not made for payment of debts, is not bound to see that the purchase money is applied by the executors in the discharge of the debts, (St. § 1126, 1128; 2 Sp. 372, 377,) even if the testator has directed his real estate to be sold for payment of debts, whether specified or not, and has made a specific bequest of a part of his personal estate for a particular purpose, or to a particular person, although such specific bequest is known to the purchaser, provided he has no reason to suspect any fraudulent or unauthorised purpose; for, otherwise, before a person could become a purchaser of personal estate specifically bequeathed, it would be indispensable for him to come into a Court of Equity to have an account taken of the assets of the testator, and of the debts due from him, so as to ascertain whether it was necessary for the executor to sell. (St. § 1129; 2 Sp. 375, 376, 377.)



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CAP. III.

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The same rule, for the same reason, applies to real estate devised for or charged with the payment of debts generally (St. § 1130; 2 Sp. 380, 382); even though the trust is only to sell, or is a charge for, so much as the personal estate is deficient to pay the debts, and even though a specific part of the real estate is devised for a particular purpose or trust, if the whole real estate is charged with the payment of debts generally by the will. If, however, the trustee has only a power to sell, and not an estate devised to him, then, unless the personal estate is deficient, the power to sell does not arise. (St. § 1131; 2 Sp. 382.)

Where, in cases of real estate, the trust is for the payment of legacies or annuities only, or of specified or scheduled debts alone, or of both, but not of debts generally, the rule is different; for they are ascertained, and the purchaser may see that the money is applied in discharge of them. But where the devise is for payment of debts generally, and also for the payment of legacies or annuities, the purchaser is not bound to see to the application of the purchase money; because, to hold him liable to see the legacies or annuities paid, would in fact involve him in the neces-

TIT. II. sity of taking an account of all the debts and  
CAP. III. assets. (St. § 1132; 2 Sp. 379, 382, 386,  
389.)

And the purchaser is not bound to see to the application of the purchase money where the specific objects of the trust are not pointed out. (2 Sp. 381.)

But if there is collusion between the purchaser and the trustees, who are guilty of a misapplication, or if there is notice that the sale or mortgage is made for the purpose of a breach of trust, the estate will be liable. (2 Sp. 384.)

In determining as to the liability of the purchaser, the Court will look to the deed or will alone, and not to the circumstances of the testator or to subsequent events: so that where a testator creates a trust or charge for payment of debts generally and legacies, and there are no debts at the death of the testator, or the debts are paid after the death of the testator, and the legacies only are left as a charge, that circumstance alone does not prevent the application of the rule. (2 Sp. 383; *Stroughill v. Anstey*, 1 D. M. & G. 653.)

Where the time appointed by the devise for a sale of real estate is arrived, and the

TIT. II.  
CAP. III.

persons entitled to the money are infants or unborn; there the purchaser is not bound to see to the application of the purchase money; because that might involve him in a trust of long continuance. But if an estate is charged with a sum of money payable to an infant at his majority, the purchaser is bound to see the money duly paid on his coming of age; for the estate will remain chargeable with it in his hands. (St. § 1133; 2 Sp. 387.)

Where the money is to be applied by the trustees to purposes which require, on their part, time, delay, and discretion, it seems the purchaser is not bound to see to the application of the purchase money. (St. § 1134; 2 Sp. 387.)

XVIII. As long as the relation of trustee and *cestui que trust*, under an express trust, is acknowledged to exist, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. (St. § 1520 a; 2 Sp. 48, 62.) And it may be observed, that where a sum of money is bequeathed to an executor, upon trust to be laid out on certain trusts, as soon as it is severed from the bulk of the estate, it ceases to be a mere legacy, and the bar of the

XVIII.  
When lapse  
of time will  
bar a *cestui*  
*que trust*.

TIT. II. Statute of Limitations does not apply; for  
 CAP. III. it is then a case of express trust, which is specially excepted. (2 Sp. 62.) But when this relation of trustee and *cestui que trust* is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavourable to its continuance, a Court of Equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. (St. § 1520 a.)

XIX. Trust performed as to the main intent.

XIX. There are numerous instances in which the Court has caused the main intent, namely, the trust, to be performed, where the qualifications intended to secure its due performance have in fact presented obstacles to its being performed at all; as where the consent of a particular person is required, and such consent is perversely withheld, or cannot be obtained by reason of his infancy. (2 Sp. 45.)

XX. Cesser of life interest on bankruptcy, insolvency, or alienation.

XX. An annuity or other life interest cannot be preserved from assignees on bankruptcy, insolvency, or alienation, in any other way than by a proviso, condition, or limitation, causing its cesser, or by a gift over to some other person. And where a trust is,

that the trustee shall receive the income, and pay and apply the same unto and for the maintenance and support of a person, his wife and children, if any, or otherwise, as they shall think proper; on the bankruptcy of such person, the assignees will take so much of the income as shall not be required for the proper maintenance of the wife and children. (2 Sp. 89, 90; Smith's Compendium of the Law of Property, 64.)

TIT. II.  
CAP. III.

XXI. The legal and equitable estates may coexist separately and distinctly in the same person, unless they are both coextensive and of the same quality; in which case the equitable estate will merge in the legal estate, or rather will so coalesce with it as to cease to have any separate existence. (See 2 Sp. 879, 880.)

XXI. Where legal and equitable estates have no separate existence.

## CHAPTER IV.

OF EXPRESS CHARITABLE TRUSTS (*a*).

I. Charities  
favored

I. CHARITIES are so highly favored in the Law, that they have always received a more liberal construction than the Law will allow in gifts to individuals. (St. § 1165, 2 Sp. 246, 247.) Thus—

in regard to  
the want of  
proper trustees;

1. In regard to the want of proper trustees, if a testator makes a bequest for charity to such persons as he shall afterwards name executors, or to such persons as his executors shall name, and he appoints no executors, or the executors die in the lifetime of the testator, and no others are appointed; or if the trustees of a charitable legacy all die in the testator's lifetime; or if a corporation intrusted with a charity fails; the Court of Chancery will execute the charity. (St. § 1165, 1166, 1177.) So if a legacy is given

(*a*) On the subject of jurisdiction in case of Charities, the reader is referred to Story's Eq. Jur. § 1142, *et seq.* and the Act for the better Regulation of Charitable Trusts, 16 & 17 Vict. c. 137, and the Act to amend it, 18 & 19 Vict. c. 124.

to persons who have no legal corporate capacity to enable them to take as a corporation; as where a legacy is given to the churchwardens for a charitable purpose. And so if a corporation for whose use a charity is designed is not *in esse*, and cannot come into existence but by some future act of the Crown. (St. § 1169, 1170.)

TIT. II.  
CAP. IV.

2. The Court of Chancery will supply all defects in conveyances, where the vendor is capable of conveying, and has a disposable estate, and the mode of conveyance does not contravene the provisions of any Statute. (St. § 1171.)

in regard to  
defects in  
conveyances;

3. In regard to the objects, it matters not how uncertain the persons or objects may be. For if a bequest is made in the most general and indefinite manner simply for charitable uses, or religious and charitable purposes, *eo nomine*, the Court of Chancery will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. But where the bequest may, in conformity to the express words of the will, be disposed of in charity of a discretionary, private nature, or be employed for any general benevolent or useful purposes, or for any general purpose, whether charitable or

in regard to  
the objects;

TIT. II. otherwise, or for charitable or other general  
CAP. IV. purposes, at discretion, the bequest will be  
— void, as being too general and indefinite for  
the Court of Chancery to execute, and the  
property will go to the next of kin. Hence  
if a man devises a sum of money to such  
charitable uses as he shall direct by a codicil  
annexed to his will or by a note in writing,  
and he leaves no direction by note or codicil,  
the Court of Chancery will dispose of it to  
such charitable purposes as it shall think fit.  
(St. § 1167.) But a bequest for such be-  
nevolent, religious, and charitable purposes,  
or for such charitable or public purposes, as  
the trustees should in their discretion think  
most beneficial, is void. (See St. § 1157,  
1158, 1164, note 4 to ed. 6, 1167, 1169,  
1183.)

Where the party has specified any particular object, and that object is contrary to the policy of the Law, or from some other reason, cannot be accomplished at all, or not in the way prescribed, the Court will devote the property to some other charitable purpose, if the nature of the gift, or the concurrence of other charitable gifts in the same instrument, indicates that although the specified object was the favorite, yet it was not



the exclusive object of the giver, but that he would have substituted some other charitable object, had he imagined that his favorite design might possibly be incapable of being accomplished. But where no such indication appears, (as where the testator's object is to build a church at W., and that cannot be effected,) the next of kin will take. (See St. § 1167—1169, 1172, 1176, 1181, 1182.) Where there are no objects *in esse*, but some may arise, the Court will keep the fund for them. And when there can be no such objects as those which are specified, or when the specified objects cease to exist, the Court will remodel the charity. (St. § 1169, 1170, 1170 a, 1176; 2 Sp. 79.)

TIT. II.  
CAP. IV.

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4. In regard to surplus income, if a testator clearly shows an intention to devote the whole income of a property to charitable purposes, it will be so applied, although his specific charitable dispositions do not exhaust the whole income. (2 Sp. 248.) And when the increased revenues of a charity are more than sufficient for the specified objects of charity, the surplus will not go to the heir at law or next of kin of the founder, but will be applied to similar charitable purposes, and to the augmentation of the benefits of the charity. (St. § 1178, 1181; 2 Sp. 248.)

in regard to  
surplus  
income;

TIT. II. 5. And, to give another instance of the  
 CAP. IV. favor shown to charity, lapse of time is no  
 in regard to bar in the case of charitable trusts. (St.  
 lapse of time. § 1192 a.)

II. Charities II. Where money is bequeathed to charit-  
 abroad. able purposes abroad, the Court of Chancery  
 will secure the fund, and cause the charity  
 to be administered under its own direction,  
 provided the charitable purposes are to be  
 executed by persons residing within the juris-  
 diction of the Court. (St. § 1186, 1300.)  
 But this will not be done, if the objects of  
 the charity are against Law or public policy,  
 unless the principle of such policy or Law is  
 of a national or conventional, rather than of  
 a universal and moral or religious character.  
 (See St. § 1184, 1185.)

III. Reward III. It seems that, with a view to encourage  
 to informers. the discovery of charitable donations given  
 for indefinite purposes, it is the practice for  
 the Crown to reward the persons who made  
 the communication, if they can bring them-  
 selves within the scope of the charity, by  
 giving them a part of the fund; and the  
 like practice takes place also in relation to  
 escheats. (St. § 1192.)

IV. Altering IV. A charity cannot be altered by any  
 a charity. new agreement between the heir of the donor  
 and the donees. (St. § 1175.)

## CHAPTER V.

## OF IMPLIED TRUSTS.

AN implied trust is a trust which is founded Definition.  
in the unexpressed but presumable intention  
of a party. (See St. § 1195, 1254.)

I. Where, in the case of a will or other I. Effectuat-  
ing the  
general in-  
tention of  
the donor of  
a power.  
instrument, the donor of a power has a general  
intention in favor of a class, and a particular  
intention in favor of individuals of that class,  
to be selected by the donee of the power,  
and the particular intention fails, from that  
selection not being made by the donee of the  
power, the Court will treat it as a trust, and  
carry into effect the general intention in favor  
of the class. (St. § 1061 a; 2 Sp. 82, 420.)

Thus, if a fund is given to certain objects,  
in such proportions as a third person shall  
appoint, if no appointment is made, the ob-  
jects named will take equally. (2 Sp. 83.)  
But if a person, making no gift himself,  
merely empowers another to give property,  
the gift must be made, or no person can  
claim, though the persons to whom the in-

TIT. II. tended gift was to be confined are named. (2  
CAP. V. Sp. 84.)

II. Where  
trusts fail,

or the pro-  
perty is un-  
exhausted by  
the trust.

II. Where property is given upon trust, and the trusts fail, either entirely or partially, by reason of the failure of the intended objects or purposes, or some of them, or of the illegality or indefinite nature of the trusts or some of them, or otherwise; or where the trusts are fully and finally fulfilled, without exhausting all the property out of which they were to be fulfilled, there is a resulting trust of such property, or of so much thereof as remains unexhausted, to the party creating the trust, or to his heir or legal representatives, unless there is sufficient evidence or presumption of a contrary intention. (St. § 1196a, 1200; 1 Sp. 510; 2 Sp. 22, 80, 243—246.)

Absolute  
gift, with an  
ineffectual  
or partial  
trust or a  
void con-  
dition.

But where there is an absolute, and, for anything that appears to the contrary, a beneficial gift, with an ineffectual or partial trust engrafted on it, the property, or so much as is unexhausted by such partial trust, will remain in the donee. (See 1 Sp. 510; 2 Sp. 23, 80.) And where there is an absolute gift, with an illegal condition, the condition is void, and the donee may retain the whole: as where a testator bequeathed leasehold pro-

perty upon condition that the legatee should assign a particular part to a charity. (2 Sp. 229.)

TIT. II.  
CAP. V.

III. An implied resulting trust also arises where a conveyance, transfer, devise, or bequest of land or other property, without any consideration, express or implied, real or nominal, purports or is proved to have been made upon trust, but no distinct use or trust is stated. (St. § 1197, 1199; 2 Sp. 57, 199, 225, 226; *Briggs v. Penny*, 3 Mac. & Gord. 546.)

III. Convey-  
ance without  
considera-  
tion, and  
without use  
or trust.

If there are any circumstances to show that a trust was intended, then the onus of proof is on the donee, to prove that a beneficial gift to him was intended. If there are circumstances from which it can be made out that it would be a fraud in the grantee to retain the property as his own, parol evidence may be given of such circumstances. If no such circumstances exist, the conveyance or transfer, if perfect, will be regarded as a beneficial gift. (2 Sp. 199.)

If a devise is to an infant or a married woman, the presumption is against the devise being upon trust; yet this presumption must yield to the fair construction of the will, if,

TIT. II. according to that, the testator appears to have  
 CAP. V. intended a trust. (2 Sp. 225.)

A discretion as to the application of the property given may be so large, that the gift may amount to an absolute gift: as where there is an uncontrolled power to give away the property as and to whom the donee may think fit. But if the discretion is limited to certain general purposes, though they may be too indefinite to be enforced, the donee is a trustee. (2 Sp. 225.)

IV. Limita-  
 tion of a par-  
 ticular in-  
 terest only.

IV. Where a person parts with or limits a particular estate only, and leaves the residue undisposed of, the residue results to him, even though there may be a consideration. (St. § 1199.)

The heir will take, as personal estate, the benefit of the surplus interest in a term or other particular interest carved out of the inheritance for a particular purpose which does not exhaust the whole, as against the devisee, where the devisee takes only what remains after the particular interest so given is carved out. (2 Sp. 230.)

A legacy to the heir or next of kin will not, of itself, preclude their claim to the surplus undisposed of. Nor will a bare intention to exclude, however expressed and accom-

panied by words of anger or antipathy, or even negative words, be sufficient to exclude the heir, in respect of the beneficial interest in real estate undisposed of, or the next of kin, in respect of personalty, unless it be either specifically or as part of a fund actually and effectually devised away to some one else, either directly, or by the same kind of necessary implication as would in other cases be admitted to constitute an actual gift. (2 Sp. 232.)

TIT. II.  
CAP. V.

V. Before the Statute 1 Will. IV. c. 40, where a testator made no express disposition of the residue of his personal estate, the executors were at Law entitled to such residue; and Courts of Equity, as the Act recites, so far followed the Law, as to hold the executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein. In that case, they were held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate. And Equity laid hold of any circumstance or expression in the will, which might appear to rebut the presumption of a gift to the

V. Undis-  
posed of  
residue of  
testator's  
personal  
estate.

TIT. II. executors, and convert them into trustees for  
 CAP. V. those on whom the Law would have cast the  
 surplus in case of a complete intestacy. (See  
 St. § 1208 and note.) The Statute furthers  
 the views of Courts of Equity, in narrowing  
 the application of the rule of Law, by enact-  
 ing, as to wills made by persons who should  
 die after the first day of September, 1830,  
 that the executors shall be deemed by Courts  
 of Equity to be trustees for the persons (if  
 any) who would be entitled under the Statute  
 of Distributions in respect of any residue not  
 expressly disposed of, unless it should appear  
 by the will, or a codicil thereto, that the  
 executors were intended to take such residue  
 beneficially.

VI. Undis-  
 posed of pro-  
 duce of real  
 estate.

VI. Where real estate is directed to be  
 sold for certain purposes, so much of the  
 real estate, or the produce thereof, as is not  
 effectually disposed of by the will at the  
 testator's death, from silence, or the inefficacy  
 of the will itself, or from subsequent lapse,  
 results to the heir, unless the testator has  
 sufficiently declared his intention that the  
 produce of the real estate should be deemed  
 personalty, whether such purposes take effect  
 or not. (2 Sp. 233; *Taylor v. Taylor*, 3 D. M.  
 & G. 190; *Robinson v. Governors of London*



TIT. II.  
CAP. V.  
—

*Hospital*, 10 Hare, 19.) If the testator directs, either expressly or by necessary implication, that the proceeds of the real estate shall be considered as having been converted into personalty before his death, and *à fortiori*, if he directs that it shall be treated as personal estate for every purpose, whether disposed of by his will or not, and whether as regards legatees or next of kin, such a direction operates to give the next of kin, as against the heir, any portion of the proceeds that may lapse or not be effectually disposed of. (2 Sp. 237.) But a mere direction that the proceeds of the real estate “shall be deemed part of the personal estate,” or even that they shall be “considered to all intents and purposes part of the personal estate,” or “shall be a fund of personal and not of real estate,” or a reference to a mixed fund by the name of “personal estate,” is not sufficient to give the surplus of the real estate to the next of kin. And any purpose, however limited, as payment of costs, apparent upon the face of the will, with reference to which the conversion might have been directed, is conclusive against the next of kin. (2 Sp. 238; *Taylor v. Taylor*, 3 D. M. & G.

TIT. II. 190; *Robinson v. Governors of London Hos-*  
 CAP. V. *pital*, 10 Hare, 19.)

If a testator converts his real estate for all the purposes of his will, so as to affect the character of the property as between the real and personal representatives of persons taking under the will, that will not prevent the heir from taking any part which is undisposed of, by way of resulting trust. (2 Sp. 234.) But what he so takes will vest in him as personal estate (2 Sp. 242), unless the other parts are devoted to the payment of charges, and he chooses to pay them off, and thereby prevent the sale, and take the estate. (2 Sp. 234.)

Undisposed  
 of part of  
 mixed fund.

Where real estate is not made a subsidiary fund, but a testator creates from real and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain purposes, as for the payment of debts and legacies, he does in effect direct that the real and personal estates, which have been converted into that fund, shall answer the stated purposes *pro ratâ*, according to their respective values. If any of those purposes fail, then the part of the fund which upon this principle would otherwise have been applicable to those purposes, is

undisposed of. As far as that part of the fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of, whether the estate be eventually sold or not; and so far as that part of the fund has been composed of personal estate, it is personal estate undisposed of, for the benefit of the next of kin. (2 Sp. 235.)

TIT. II.  
CAP. V.

Where money is devised to be laid out in land, the same principle applies as where land is directed to be converted into money: the conversion will operate only so far as the will disposes of the land into which it is to be converted, so that if the land is devised for a limited estate only, the produce of the fund, or the fund itself, if unconverted, beyond the interest so given, will result to the testator's next of kin, unless it be devised away to some other person. (2 Sp. 235.)

Undisposed  
of part of  
money di-  
rected to be  
converted, or  
of the pro-  
duce thereof.

Where, in the events that happen, the contemplated object for which a conversion of land into money or money into land was to be made does not exist, the Court will not vary the property from that state in which it was found at the death of the testator; for where the purpose fails, the intention fails. (2 Sp. 234, 261.) But if any event shall have happened on which the conversion

Failure of  
the object for  
a conversion.

TIT. II.  
CAP. V.

ought to take place, though the object for the conversion afterwards ceases to exist, the property will be treated as if converted. (See 2 Sp. 262.)

VII. Charges.

Devise in  
trust to pay  
debts and  
charges.

VII. Implied trusts are often created by charges. Where a testator devises an estate in trust to pay debts or other charges, no beneficial interest passes to the devisee, but he is a mere trustee for the payment of debts or charges, and, as to the residue, after payment thereof, a trustee for the heir. But where an estate is devised, charged with or subject to debts or other charges, the whole beneficial interest passes to the devisee, subject only to the payment of the debts or other charges. (St. § 1245; 2 Sp. 23 n. (b), 226.)

Devise  
charged with  
or subject to  
debts and  
charges.

Indirect  
charge of  
debts.

In the interpretation of wills, favor to creditors has been an acknowledged principle of construction. (2 Sp. 327, n. (g).) And real estate may be charged by will with the payment of debts, even by a mere expression of an intention that the testator's debts should be paid, without any other indication that they are to be paid out of the real estate, and whether such expression be contained at the beginning of the will, or in any other part. But if a testator directs a particular person to

pay, it is natural to presume that the testator intended him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control; and if the executor is pointed out as the person to pay, that ordinarily excludes any presumption that other persons, not named, are to pay, or that the debts are to be paid out of the real estate. (See St. § 1246, 1247, 1247 a; 2 Sp. 320—322.) But when a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to him, it is considered that the testator has imposed upon the executor the duty of paying the debts to the extent of the property given to him, and accordingly the property is held to be charged with the debts. (*Harris v. Watkins*, 1 Kay, 438.)

TIT. II.  
CAP. V.

Where lands are subjected by deed to payment of debts, they will stand charged with such debts only as were owing at the time of making the deed, unless a contrary intention appear on the face of the deed. But the reverse is the case where the charge is by will. (2 Sp. 352, 353.)

Extent of  
charge.

If a legacy is given generally, the legatee must resort to the personal estate only. (2 Sp. 327, 334, 342.) But it may be charged on

Charge of  
legacies.

TIT. II. real estate either expressly or by plain impli-  
CAP. V. cation. (See 2 Sp. 327—329, 342.) Thus,  
— where a testator makes a provision in the same clause for payment of debts and legacies together, the natural inference is that he intends both to be paid in the same way; and therefore if the debts are payable out of a mixed fund, so will be the legacies. So when a devise is made in a residuary form, and yet there is no previous devise, legacies are thereby made a charge upon the real estate; it being considered that the word residue must mean the residue of the real estate after payment of the legacies thereout. (2 Sp. 328; *Francis v. Clemow*, 1 Kay, 435.) But even where there has been a previous devise, which was sufficient of itself to account for the residuary form of a subsequent devise, it has been held that such residuary form rendered legacies a charge upon the real estate. (*Francis v. Clemow*, 1 Kay, 435, and cases there cited; *Harris v. Watkins*, 1 Kay, 438.)

Even where real estate is charged, it will not be held to be liable until after the general personal estate is exhausted, unless there is an intention to exonerate the personal estate (2 Sp. 338), as where nothing is given to the

legatee but a sum to be raised out of the real estate, or where a portion of the real estate or its produce is appropriated as a fund for payment of the legacies. (2 Sp. 342.)

TIT. II.  
CAP. V.

Although all the real estates of a deceased are now rendered liable for his debts generally, the creditors have no charge on the land, so that they cannot follow it: their remedy is merely personal. (2 Sp. 344.)

General liability of real estate of deceased debtor.

Whether real estate is subject to debts or legacies, or both, by way of trust, or of charge, or of legal power in the nature of a trust, the estate can only be turned into money, and the proceeds distributed, in case of dispute or difficulty, through the agency of the Court of Chancery. (2 Sp. 365.)

Mode of giving effect to charges.

Where an authority to sell is given to a particular person, the vendee takes under the will: any right or title in the heir is excluded, and there is no need of his joining in the sale. (2 Sp. 366.)

If a sale is necessary to the due execution of a trust for payment of debts or legacies, the law will give the trustee a power of sale without a specific authority being given by the testator. And if a testator directs a sale, without declaring by whom it shall be made, and the fund is distributable by the executors,



TIT. II. they will have by implication a power of sale.  
CAP. V. (2 Sp. 367.)

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A charge for payment of debts gives the creditors a priority over the special purposes of the devise. (2 Sp. 368.)

Where the estate is charged with annuities, it is not the course to discharge the lands: they will still be charged in the hands of a purchaser. (2 Sp. 369.)

Where annual and gross charges are to be raised out of the rents and profits, or by sale or mortgage, if those words are evidently used in contradistinction, the annual charges will be raisable out of the annual rents and profits, and the gross charges by sale or mortgage. (2 Sp. 370.) But the Court of Chancery will in general consider a charge on the rents and profits to raise portions, legacies, or debts, as a charge on the land, if such charge is not restrained to the annual profits, and will imply a power to sell or mortgage. (2 Sp. 406; *Lord Londesborough v. Somerville*, 19 Beav. 295.) And yet if no time for payment is appointed, as a general rule a sale will not be decreed, but the portion must be raised in the manner directed. (2 Sp. 406.)



VIII. Where a person buys freehold, copyhold, or leasehold lands, and pays the purchase money for it, but takes the conveyance or assignment in his own name and that of another or others, or exclusively in the name of another or others, whether jointly or successively, the trust of the legal estate will result to the person who advanced the purchase money; for it is presumed that the real purchaser intended the purchase to be for his own benefit, and took it in the name of another or others merely to answer some collateral purpose. The same doctrine is applied to securities taken in the name of a third person. (St. § 1201, 1201 a; 1 Sp. 511; 2 Sp. 201, 219.) And proof of the payment of the purchase money by the real purchaser may be furnished either by the language of the deed itself, or by some memorandum or note of the nominal purchaser, or by his answer to a bill of discovery, or by papers left by him and discovered after his death. (St. § 1201, note; 2 Sp. 202.)

TIT. II.  
CAP. V.

VIII. Conveyance, assignment, or security, in another's name.

In like manner, there will be a resulting trust, where stock is purchased in the name of the purchaser and a stranger, or is transferred by the owner into the name of himself and a stranger. But if a man delivers money

Purchase or transfer of stock, or delivery of money.

TIT. II. or transfers stock to another, even though he  
CAP. V. be a stranger, no implied trust will arise, un-  
less upon evidence. (2 Sp. 219.)

Where a re-  
sulting trust  
is rebutted ;

No resulting trust will be raised, where a contrary intention, unrebutted by other evidence or grounds of presumption, is indicated by the terms or the object and purpose of the instrument creating the trust, or is established by written or parol evidence, or may be presumed from the relation between the parties.

as where a  
purchase or  
security is  
taken in the  
name of a  
wife or child.

(St. § 1196 a, note, and 1202.) And hence, in general, there will be no resulting trust where a purchase is made or a security is taken by a husband or a father (either solely or jointly with his own name or that of a stranger) in the name of a wife, or in the name of a legitimate child unprovided for, or even of an illegitimate child unprovided for, if treated as a child, or by a grandfather in the name of his grandchild unprovided for, where the father is not living ; because it will be presumed that it was intended as an advancement and provision in discharge of a moral obligation, and as a tribute of affection ; unless there are circumstances which furnish a strong presumption of a contrary intention ; such as a contemporaneous declaration or act to manifest an intention that the party should take as a

trustee. A subsequent act or declaration will not suffice to negative an advancement. Nor will possession or receipt of the rents by the person who advanced the money, where it may be fairly regarded as having been had as a trustee for the other party.

TIT. II.  
CAP. V.

In other cases where the relationship is not such as to ground a presumption of advancement, the recognition of relationship and expressions of affection or regard ought to be looked to, in determining whether a beneficial gift was intended. (St. § 1202—1205, and note; 2 Sp. 214—219, 227, 228.)

IX. Limitations which confer an estate in joint-tenancy at Law have the same effect in Equity, when there are no circumstances which afford grounds for a departure from the rule of Law. So that where two or more persons purchase lands, and advance the money in equal shares, and take a conveyance to them and their heirs, this is a joint-tenancy. But joint-tenancy is not favored in Equity; so that Courts of Equity will lay hold of any circumstances which will enable them to vary in this respect from their practice of following the Law. Thus, if two persons advance a sum of money by way of mortgage, and take a mortgage to them

IX. Limitations which would create a joint-tenancy at law.

Joint mortgage.

TIT. II.  
CAP. V.

Joint pur-  
chase.

jointly, and one of them dies, his representatives will be entitled to his proportion as a trust. So if two persons jointly purchase an estate, and pay unequal proportions of the purchase money, and take the conveyances in their joint names; in case of the death of either of them, there will be no survivorship, but they will be deemed to be purchasers in the nature of partners, and to have intended to hold the estate in proportion to the sum which each advanced. (St. § 1206; 2 Sp. 206, 207, n. (a), 214.) And where real or personal estate is purchased for partnership purposes, and on partnership account, the legal estate, in whomsoever it may be vested, is in Equity deemed to be partnership property not subject to survivorship. (St. § 1207; 2 Sp. 207; 2 Bl. Com. 399.)

X. Covenant  
or trust to  
purchase  
lands.

X. Where a person has covenanted to lay out money in the purchase of land, or to pay money to trustees to be laid out in the purchase of land to be settled, if he afterwards purchases land to himself and his heirs, but does not settle it, the land will be subject to the trusts upon which the land to be purchased was to be settled; for, unless the contrary clearly appears, it will be presumed that he purchased in fulfilment of his

covenant, upon the principle that acts capable of being considered as done in fulfilment of an obligation shall be so construed. (St. § 1210; 2 Sp. 204—206.) And where a trustee or agent is bound by a trust to lay out money in land, if he actually lay it out, the act will, if possible, be presumed to have been done in execution of the trust. (2 Sp. 204—206; *Manningford v. Toleman*, 1 Coll. C. C. 670; *Ex parte Poole*, 11 Jur. 1005.)

TIT. II.  
CAP. V.  
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XI. It is a general rule, that if a settlor covenant to convey and settle lands, without specifying any in particular, such covenant shall not constitute a specific lien on his lands, and the covenantee will be deemed a creditor by specialty only (St. § 1249); for he may have intended to purchase land for the purpose, instead of settling any part of the land he then had.

XI. Covenant  
to settle  
lands.

XII. In case of assignments of debts, where the assignor has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties. Thus, the assignee of a debt secured by a mortgage will, in Equity, be held entitled to the benefit of the mortgage. (St. § 1047 a.)

XII. Col-  
lateral secu-  
rities for a  
debt as-  
signed.

TIT. II.  
CAP. V.

XIII. Trust  
as to orna-  
mental  
timber.

XIII. Equity implies a trust as to ornamental timber in favor of the object of subsequent limitations. So that a tenant for life may be restrained from abusing his legal power by cutting down ornamental timber, which is called equitable waste. (2 Sp. 305.)

XIV. Trust  
of wife's  
mortgaged  
property.

XIV. An implied trust arises in favor of the wife, when she joins with the husband in effecting a mortgage upon her property, and there is no recital and no special circumstances to show that her interest was intended to be changed beyond the creation of an incumbrance, and yet the equity of redemption is reserved to the husband. (2 Sp. 306.)

## CHAPTER VI.

## OF CONSTRUCTIVE TRUSTS.

IMPLIED trusts and constructive trusts, as already observed, are frequently confounded or classed together; and the same trusts are sometimes designated by the name of implied trusts, and at other times by that of constructive trusts. (1 Sp. 509, note (a).)

Implied and constructive trusts often confounded.

But a constructive trust, as distinguished both from express and from implied trusts, may be defined to be a trust which is raised by construction of Equity, in order to satisfy the demands of justice, without reference to any presumable intention of the parties. (See St. § 1195, 1254; 1 Sp. 509.)

Definition of a constructive trust.

I. A constructive trust arises where a person who is only joint owner, acting *bonâ fide*, permanently benefits an estate by repairs or improvements; for a lien or a trust arises in his favor, in respect of the sum he has expended in such repairs or improvements. So, where a party lawfully in possession under a defective title has made permanent

I. Repairs or improvements.

TIT. II. improvements, if relief is asked in Equity by  
CAP. VI. the true owner, he will be compelled to allow  
— for such improvements; for he who seeks for  
Equity must himself do Equity. (St. § 1234,  
1236, 1237; 2 Sp. 206, 573.) But if a tenant  
for life thinks fit, of his own discretion, or  
with the consent of trustees, to expend money  
in improvements, he is not entitled to have  
the money repaid out of the corpus: so that  
if he becomes the purchaser of the property,  
he will not be entitled to a deduction from the  
purchase money in respect of the improve-  
ments. (*Dixon v. Peacock*, 3 Drewry, 388,  
392.)

II. Payment  
of legatees or  
distributees  
before credi-  
tors.

II. So, where executors, by mistake, but  
*bonâ fide* and without fault, have paid le-  
gatees or distributees before a due discharge  
of all the debts, the latter are treated as  
trustees for the purpose of paying the debts;  
because they are not entitled to anything  
except the surplus of the assets, after all the  
debts are paid. (St. § 1251; 2 Sp. 297.)

III. Cove-  
nant or agree-  
ment to con-  
vey, transfer,  
or pay money  
or other pro-  
perty.

III. Where a person is under a covenant  
or agreement, for valuable consideration, to  
convey, transfer, or pay money or other pro-  
perty to or for the use or benefit of another,  
a constructive trust arises in favor of the  
latter against the former and his represen-



tatives, and those claiming under him as volunteers or with notice of the covenant or agreement; because, where things are covenanted or agreed to be done, Equity treats them, for many purposes, as if they were done. (See St. § 1212, 1231.)

Thus a constructive trust arises when the purchase money of an estate is not paid. In such case the vendor has a lien on the property in Equity; that is, a hold upon it for the satisfaction of the purchase money; and, to the extent of the lien, the purchaser becomes a trustee for the vendor. (See St. § 1215, 1317—1220.) And although, in some cases, it is reasonable to presume a tacit consent or agreement that the vendor should have such a lien, yet the lien is not strictly attributable to such a consent or agreement, but is founded on the most obvious principles of natural justice. (See St. § 1219, 1220.)

TIT. II.  
CAP. VI.

Nature of,  
and reasons  
for, the ven-  
dor's lien.

In general, the vendor has such a lien; and the burden of proof is on the purchaser, to establish, that in the particular case it has been intentionally displaced or waived by the consent of the party. (St. § 1224.) If, on the face of the conveyance, the consideration is expressed to be paid, and even if a receipt

Where it  
originally  
exists.

TIT. II. is indorsed on the back of the conveyance, and  
 CAP. VI. yet the money has not actually been paid, the  
 — vendor has a lien. (St. § 1225.) And if a  
 security has been taken for the money, the  
 burden of the proof has been adjudged to lie  
 on the purchaser, to show that the vendor  
 agreed to rest on the security and to dis-  
 charge the land; or, at most, the taking of a  
 security has been deemed to be no more than  
 a presumption, under some circumstances, of  
 an intentional waiver of the lien, and not as  
 conclusive of the waiver. (St. § 1226.)

Continuance  
 thereof.

When the vendor has a lien against the  
 vendee, it continues, notwithstanding any  
 devolution or transfer of the estate, except  
 where it is extinguished by the countervailing  
 Equity of a *bonâ fide* purchaser for valuable  
 consideration without notice, when clothed  
 with the legal title.

Against  
 whom it  
 exists.

So that it exists against the vendee and  
 his heir, and against volunteers claiming  
 under him; against purchasers under him,  
 with notice that he had not paid the purchase  
 money; against purchasers, even without no-  
 tice, having an equitable title only; against  
 assignees claiming by a general assignment  
 under the bankrupt and insolvent laws;  
 against assignees claiming under a general

TIT. II.  
CAP. VI.

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assignment made by a failing debtor for the benefit of creditors; and against a judgment creditor of the vendee, at least before an actual conveyance of the estate has been made to him. (See St. § 1228.) For, in each of these cases, (except that of the *bonâ fide* purchaser for valuable consideration without notice, who has only an equitable title,) the party in possession has obviously no more equity against the lien of the vendor, than the vendee himself had, but clearly stands in the same situation and subject to the same equity. And although the *bonâ fide* purchaser without notice who has only an equitable title, has an equity quite distinct from that of his vendor, the first vendee, yet the equity of such purchaser to retain what he has paid for is only equal to that of the first vendor to be paid for that which he has parted with; and when the equities are equal, and neither of the parties has the support of the legal title, the maxim applies, *Qui prior est in tempore, potior est in jure*.

But the lien will not prevail against a *bonâ fide* purchaser for valuable consideration from the vendee, where such purchaser has paid his purchase money, and taken a conveyance of the legal estate, and had no notice, at the

TIT. II.  
CAP. VI.  
—

time of paying his money, that such vendee had not paid the purchase money (St. § 1228, 1229); because, having given a valuable consideration for the estate, without notice, he has as much equity to retain what he has so paid for, as the original vendor has to be paid for that which he has parted with; and having this equal equity, the Court will not take from him the legal title with which he has clothed himself, but will act upon the maxim, that where the equities are equal, the law shall prevail; so that, in this case, the vendor's lien is virtually extinguished by the counter-vailing equity of the purchaser from the vendee. But where a vendee has sold the estate to a *bonâ fide* purchaser without notice, if the sub-purchase money has not been paid, the original vendor may proceed against the estate for his lien, or against the sub-purchase money in the hands of such purchaser. (St. § 1232.)

Where the vendee has sold only a part of it, the part retained by him is primarily chargeable with the lien. Where he has sold different parts to different persons, the lien is to be borne rateably between them. (St. § 1233 a.)

IV. If a trustee, or other person standing in a fiduciary relation, acquires property, or makes a profit by means of transactions within the scope of his agency or authority, or if a person employs another's property in any trade or speculation, there will be a constructive trust, as to the property so acquired or the profits so made, for the benefit of the *cestui que trust*, principal, owner, or other party standing in the opposite relation. (See St. § 1211, 1211 a, 1261; 1 Sp. 512; 2 Sp. 208, 299, 300.) So that, if a trustee should purchase a lien or mortgage on a trust estate at a discount, he would not be allowed the benefit of the difference, but the purchase would be a trust for the *cestui que trust*. So, if a trustee or a partner should renew a lease of the trust or partnership estate, he would be a trustee of such renewed interest for his *cestui que trust* or copartner, even though the lessor may have refused to grant a renewal to the *cestui que trust* or copartner. (St. § 1211; 1 Sp. 512; 2 Sp. 208, 299, 300.) So if an agent, who is employed to purchase for another, purchases in his own name, or on his own account, he will be held to be a trustee for the principal, at the option of the latter. (St. § 1211 a.)

TIT. II.  
CAP. VI.

IV. Property  
acquired, or  
profits made,  
by persons in  
a fiduciary  
relation.

TIT. II.  
CAP. VI.

V. Renewal  
of lease by a  
person  
having a  
limited in-  
terest.

V. Upon analogous principles, if a mortgagee or a person having a limited interest in leasehold property, renews the term on his own account, he will be held to be a trustee for all the persons interested in the old lease. (1 Sp. 512; 2 Sp. 299, 302, 303.)

The person so converted into a trustee of a renewed lease is entitled to the costs and expenses of renewal, with interest, and to compensation for repairing, building, and lasting improvements; and he may retain the renewed lease to secure the payment. (2 Sp. 304.)

VI. Wrong-  
ful conver-  
sion or alien-  
ation of trust  
property.

VI. In general, whenever property of one kind has been wrongfully converted into property of another kind, by a trustee or agent, if the property which has been so substituted can be ascertained to be such, it will be liable to the rights of the *cestui que trust* or principal to which the property converted was subject. (See St. § 1158, 1560; 2 Sp. 203.)

The right of the principal or *cestui que trust* ceases only when the means of ascertainment fail; which of course is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description. (St. § 1259.) But in cases of this sort, the *cestui que trust* or beneficiary is not at all bound by

the act of the other party. He has an option to insist on having that into which the trust property has been converted, or to disclaim any title thereto, and resort to any other remedy to which he is entitled, either *in rem*, or *in personam*. (St. § 1262.) But he cannot insist on repugnant claims: so that, in the case of a sale of stock by a trustee or executor, in violation of his trust, the party beneficially entitled might either oblige the trustee or executor to replace the stock, or he might affirm his conduct, and take the sum at which he had sold it, with interest and any further profits he might have made by the sale; but the party beneficially entitled could not insist on having the stock replaced, and having the interest instead of the dividends, or on taking the money, and having the dividends as if the stock had remained. (St. § 1263.)

TIT. II.  
CAP. VI.  
—

If however the trustee conveys the trust property to a *bonâ fide* purchaser for valuable consideration, who has paid his purchase money, and had no notice of the trust at the time of paying the same, the trust is extinguished. But if the trustee should afterwards re-purchase or otherwise become entitled to the same property, the trust would be revived



TIT. II. by construction of Equity. (See St. § 1264,  
CAP. VI. and note ; 2 Sp. 40, 195, 196.) And if a trustee conveys or assigns the trust property for valuable consideration, in violation of the trust, to a person who is aware of that circumstance, or conveys or assigns it without valuable consideration, even to a person who has no notice, such person will be treated as a trustee for the *cestui que trust*. And an executor is deemed a trustee of the assets of his testator. (St. § 1257 ; 1 Sp. 512 ; 2 Sp. 40, 195, 298.)

VII. Trust  
of mortgaged  
estate.

VII. Where a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises descends to his heir ; but by construction of Equity he is trustee for the personal representatives, and through them for the persons entitled to the personal estate of the mortgagee. (2 Sp. 296.)

VIII. Debt  
due from  
executor.

VIII. A debt due from an executor is in effect extinguished at Law ; for by the rules of Law there is no remedy for it ; but in Equity the executor is converted into a trustee of the debt for the parties interested in the estate. (2 Sp. 296.)



## CHAPTER VII.

### OF TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

I. ALL persons excepting aliens, so far as I. Who may be trustees. regards real estate, and excepting persons attainted, but not excepting femmes covert and infants, may be trustees. (2 Sp. 32.)

II. If a person who is appointed executor II. Acceptance of office. proves the will, he becomes liable for the performance of the duties of the office ; and if he is also appointed trustee, the taking probate is an acceptance of the entire trust. (2 Sp. 918.)

III. If a man appoints a trustee of real or III. Devolution or delegation of a trust. personal estate, without naming his heir or personal representative, the heir or personal representative does not become a trustee, although the property may vest in such heir or representative. And where two or more persons and the survivor and the heirs of the survivor are appointed trustees, and the word "assigns" is not introduced, the sole or surviving trustee cannot delegate the trust

TR. II. either by act *inter vivos* or by devise. (2  
CAP. VII. Sp. 38.) A trustee cannot, without the  
consent of his *cestui que trust* or of the  
Court, denude himself of the character of  
trustee till he has performed the trust. If  
without such consent he assigns the trust, or  
delegates the performance of its duties to a  
stranger, he will be answerable for the breaches  
of trust committed by the assignee or stranger.  
(2 Sp. 920.)

IV. Equity  
never wants  
a trustee.

IV. It is a rule in Equity, which admits of  
no exception, that where a trust exists, a  
Court of Equity never wants a trustee. For,  
wherever a perfect trust, as opposed to a  
trust resting in contract or in *feri*, or even  
an imperfect trust, if supported by a valuable  
consideration, has once attached, whether it  
is an expressed, an implied, or a constructive  
trust, and it is not extinguished by the coun-  
tervailing equity of a *bonâ fide* purchaser for  
valuable consideration without notice, or other  
person having a conflicting equity, nor has  
otherwise ceased to subsist, Equity will fol-  
low the legal estate and decree the person in  
whom it is vested to execute the trust. (See  
St. § 976, 1159, 1162; 1 Sp. 501; 2 Sp. 51,  
52, 369, 875, 876.) And the lapse of the  
legal estate never has the least influence on

the trusts to which it is subject: if the individuals named fail, either by death, incapacity, or refusal, the Court will provide a trustee: if no trustees are appointed at all, the Court assumes the office in the first instance. (2 Sp. 876.)

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CAP. VII.

V. Trustees, executors, directors of private companies, and other persons standing in a similar situation, are not allowed, even with the consent of their co-trustees, co-executors, or co-adjutors, to take any remuneration by way of commission, or brokerage, or salary, without some express or implied provision for that purpose in the instrument under which they claim. (St. § 466 a, 1268; 2 Sp. 945, 646.) But trustees are entitled, without any express provision, to defray out of the trust funds expenses legitimately and properly incurred. (2 Sp. 938.)

V. No remuneration allowed.

Expenses allowed.

VI. By analogy to the case of a gratuitous bailee, a trustee would seem to be liable only for gross negligence. (St. § 1268.) On the other hand, it might appear that in practice Courts of Equity have in many cases required extreme circumspection and vigilance, while, in others, they have been satisfied with the degree of care usually exhibited by men

VI. What care and diligence they are bound to use.

*Primâ facie* view of the decisions on the subject.

TRR. II. in the management of their own affairs. (St.  
CAP. VII. § 1272, 1273; 2 Sp. 917.)

True state of  
the case.

But the true state of the case seems to be this: that there are certain things which either clearly appear in themselves to be duties, or are established as such by the uniform policy of Courts of Equity; and to these, the Courts require a rigid adherence. But in regard to other points, the trustee is only required to use customary care and diligence; that which is usually exercised by men of ordinary prudence and vigilance in the management of their own affairs.

Omission to  
sell.

Thus, if a trustee omits to sell property when it ought to be sold, and it is afterwards lost, although without any fault of his, he is liable; because the loss, although not directly occasioned by his default, would never have happened had he not failed in performing what must have appeared a palpable, although perhaps not an urgent, duty. (See St. § 1269, note; 2 Sp. 934.)

Improper in-  
vestment.

Again, Courts of Equity are in the habit of directing property in their own possession to be invested on real security or in the £3 per Cents.; and it has become an established duty, on the part of trustees, to invest on such security or in those funds. And this

rule, like an Act of Parliament, or any other kind of Law, is supposed to be well known, and no one is allowed to plead ignorance of it. If therefore a trustee invests, or even suffers money previously invested to remain, on unauthorized security, however unexceptionable it might seem to be, and such security afterwards fails, or if he permits choses in action to remain outstanding, and a loss arises, he will be liable; as also he will for the fluctuations of any unauthorized fund. (See St. § 1269, note, 1273, 1274, note; 2 Sp. 923, 926, 934.) £3 per Cent. Consols is the fund which is usually selected by the Court for investment; but £3 per Cent. Reduced is frequently resorted to for convenience, as when quarterly payments have to be made. (2 Sp. 552, note (a).)

According to the general understanding of the profession, and the general practice of the Court, where trustees are authorized to invest on mortgage of real estate, they are not justified in advancing more than two-thirds of the value of agricultural freeholds, or one-half of the value of freehold houses; and if the value depends upon fortuitous circumstances—for instance, if the property consists of a mill, or factory, or house situate in a watering-place,

TIT. II.  
CAP. VII.  
—

TIT. II. or the like—the trustees run the risk of having  
 CAP. VII. the mortgage thrown upon themselves, and  
 — of being made answerable for the money advanced. (2 Sp. 925; Remarks of Sir J. Romilly, M. R., in *Macleod v. Annesley*, 16 Beav. 605.) And an authority to lend on such personal security as they shall think sufficient will not justify the trustees in lending it to the husband who is in trade, or indeed to a trading concern. (2 Sp. 926.) And an indemnity clause, declaring that they shall not be liable for the insufficiency of any security, will not exonerate them from liability if they lend on palpably inadequate security. (*Drosier v. Brereton*, 15 Beav. 221.)

Omission  
 of one trustee  
 or executor  
 to see that  
 the property  
 is duly se-  
 cured or ap-  
 plied.

Again, where there are two or more trustees or executors, it is the duty of each trustee and executor to see that the property is duly secured or rightly applied, as the case may be. And therefore, as a general rule, if by the act, direction, agreement, or consent of one of them, the trust fund is paid over to the other, even though it was so paid over in order to be applied by the receiver for those purposes for which it was properly applicable, and the receiver wastes or misapplies it, each will be answerable for the whole; except in the case of money remitted to a co-trustee or

co-executor, to be paid by him in his neighbourhood, where the trustee or executor remitting the same, in case it had been his own money, would naturally have remitted it to some one to pay it away, instead of undertaking a journey for the purpose of paying it himself. (St. § 1180 a, 1281, note, and 1284, and note; 2 Sp. 370, n., 920, 934.) So if one trustee improperly suffers the other to detain the trust money a long time in his own hands, without security, or lends it to the other, or joins or acquiesces in a loan of it to any one else, on insufficient security; each will be liable for the whole loss which may happen. And so if it is mutually agreed between them, that one shall have the exclusive management of one part of the trust property, and the other trustee of the other part, each will be liable for any loss which may happen, even to the part of which the other has the management (St. § 1274, 1284; 2 Sp. 920, 922, 923, 932); because the party not acting was in default for giving the other the power, and exposing him to the temptation, to commit a breach of trust, instead of exercising that control over the property which it was his duty to exercise for the protection and due management thereof.

TIT. II.  
CAP. VII.



TIT. II.  
CAP. VII.

Losses with-  
out want of  
customary  
care or dili-  
gence.

On the other hand, if a trustee or other person standing in a fiduciary relation has not failed in doing what must have appeared to be a palpable duty, and has invested the property on authorized security, he will not be answerable for losses which happen without any want of customary care or diligence on his part. (See St. § 1269, note, 1274, note, and 465; 2 Sp. 937.) So that if he deposits the money with a banker in good credit, to be remitted to the proper person by a bill drawn by a person in due credit, and the banker or drawer of the bill becomes bankrupt, he will not be responsible. The rule in all cases of this sort is, that where a trustee acts by other hands, either from necessity, or conformably to the common usage of mankind, he is not to be made answerable for losses. (St. § 1269; 2 Sp. 933—935.)

VII. Non-in-  
vestment.

VII. If trustees do not invest trust money when they ought to do so, even though they have made no profit by it, they are responsible, at the option of the *cestuis que trust*, either for the money, and interest at £4 per cent., or the stock which might have been purchased therewith at the time when the investment ought to have been made, and the dividends. (St. § 1273 a; 2 Sp. 924; *Att.-Gen. v. Alford*, 4 D. M. & G. 843.)



VIII. As a general rule, where a testator subjects the residue of his personal estate to a series of limitations, directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, there, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds or Bank Long Annuities), must be converted and put in such a state of investment, as to be securely available for all persons interested in it. And if the residue comprises property of a reversionary nature, that, also, must be converted. The one rule protects the remainder-man, the other protects the tenant for life. (See 2 Sp. 42, 552—557; *Bate v. Hooper*, 5 D. M. & G. 338.)

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CAP. VII.

VIII. Conversion of terminable and reversionary property.

IX. Where personalty is directed to be converted as soon as conveniently may be, there, as between the executors and the persons interested in the estate, the personalty is to be considered as converted within a year; that being considered as the time within which, in the generality of cases, it may be converted with ordinary diligence. (2 Sp. 42, 565, note (c).)

IX. Time allowed for conversion.

X. When a sum of stock is given to trustees in trust for a married woman for life,

X. Investment on mortgage.

TIT. II. with remainder to her children, being infants,  
 CAP. VII. the Court will not ordinarily give its sanction  
 ————— to the fund being sold out and invested on mortgage, so as to give the tenant for life a greater interest, though power may have been given to the trustees to lay out the property on real security, and though they join in the petition. (2 Sp. 569.)

XI. Equity  
 guards  
 against a  
 breach of  
 trust.

XI. It is the wise policy of Courts of Equity to guard against a breach of trust, by prohibiting all acts which may unnecessarily place the trustee in a situation of temptation. (See 2 Sp. 300.)

Trustee may  
 not mix the  
 trust money  
 with his own.

Hence, in all cases in which a trustee places trust money in the hands of a banker, he should take care to keep it separate from his own. For, if he should mix it with his own in a common account, he would be deemed to have treated the whole as his own, and will be charged with interest, and would be held liable to the *cestui que trust* for any loss sustained by the banker's insolvency. (St. § 1270; 2 Sp. 934.) If the trustee were at liberty to mix the trust money with his own, he would often be tempted to use it as his own: and frequently, indeed, he would not know whether the money with which he was carrying on his affairs was

his own or not. In this way, he would be naturally led to expend the trust money on his own account, and loss to the trust property would frequently be occasioned, even without any design to commit a breach of trust.

Similar observations may be made with respect to an agent. (St. § 468.)

XII. Upon the same principle, a trustee or other person standing in a fiduciary relation is never permitted to make any profit to himself in any of the concerns of his trust: if any advantage is gained by such a person, it belongs to the *cestui que trust*. Hence he is accountable for all the interest which he ought to have made, and would have made, by the investment of the property on the security directed by the instrument creating the trust, or on the security authorized by the general rule of the Court in the absence of any such direction as to the mode of investment. And he will also be accountable for any interest and gains beyond the amount of such interest as above mentioned, which he has actually made on, or with, or in regard to, the trust property, whether in the ordinary discharge of his duty, or in transactions entered into for his own benefit, as

TIT. II.  
CAP. VII.

XII. Trustee  
is account-  
able for in-  
terest and  
gains.

TIT. II.  
CAP. VII.  
— he supposed, or otherwise ; if the amount of such extra interest and gains can be ascertained. (See St. § 465, 1211, 1261, 1277, 1278, 1269, note ; 2 Sp. 300, 945.) Or he will be made to pay interest at the rate of £4 or £5 per cent. (2 Sp. 921.) And, under extraordinary circumstances, the Court will direct annual or half-yearly rests to be made, so as to give the *cestui que trust* the benefit of compound interest : as, if a trustee, in manifest violation of his trust, has applied the trust fund to his own benefit and profit in trade, or has conducted himself fraudulently, or has wilfully refused to follow the positive directions of the instrument creating the trust, as to the investment of the property. (St. § 1277 ; 2 Sp. 921.) And if a trustee or particular agent purchases from his *cestui que trust*, even at a public auction, unless the *cestui que trust* intended that the trustee should buy, and there has been no fraud, concealment, or advantage taken on the part of the trustee, the *cestui que trust* has the option of taking to or repudiating the transaction. (2 Sp. 300, 301, 943, 944.) A person may indeed grant a beneficial interest to his trustee, agent or receiver ; yet the latter must show that the dealing was fair, and that

the grantor had the same knowledge as he himself had. (2 Sp. 301, 944.)

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CAP. VII.

XIII. A trustee (as in certain cases we have already noticed) is responsible for his own acts and defaults, and for those wrongful acts and defaults of his co-trustees to which he is privy, and in which, though without any corrupt motive, he expressly, tacitly, or virtually acquiesces, or which would not have happened but for his own act or default. Thus, if two trustees have properly sold out trust monies, and one of them hands the cheque for the proceeds to the other, who misapplies the money, they are both liable. (*Trutch v. Lamprell*, 20 Beav. 116.) And the same rule applies to executors and other persons standing in a fiduciary relation. But trustees and others standing in a fiduciary relation are not otherwise responsible for the acts or defaults of each other. (2 Sp. 918, 928.)

XIII. Responsibility for each other's acts and defaults.

There is, however, an important distinction in connexion with this point, between the case of mere executors and the case of trustees; which, nevertheless, does not militate against the application of the above-stated rule both to trustees and executors, but is founded in the different power with

Distinction between trustees and executors in regard to the effect of joining in receipts.

TIT. II.  
CAP. VII.  
—

which they are legally invested, and amounts only to this: that a particular circumstance which would afford a presumption of the performance of an act involving responsibility, in the case of an executor, will not afford any presumption thereof in the case of a trustee.

Thus, trustees have only a joint interest, power, and authority, and must all join both in conveyances and receipts; and yet it would be impracticable in some cases, and expensive and inconvenient in others, to require that all should together actually receive the trust money from the party by whom the same may be payable. Hence, it cannot be inferred from a trustee's joining in a receipt, that he has received any part of the money; and therefore, although trustees, who are authorized to sell land and receive money, jointly give a receipt, each will ordinarily be liable only for so much of the money as he has received.

But where there are co-executors, each has a several right to receive the debts due to the estate, and all other assets, and is competent to give a valid discharge by his own separate receipt; and therefore, if they join in a receipt, it is purely a voluntary act,

and it will be presumed that they jointly received the money. TIT. II.  
CAP. VII.

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In each case, however, the same rule applies as to responsibility for money received; although, in the one case, the party, being a trustee, is not presumed to have done the act which would make him responsible, namely, the act of receiving the money; because the act done by him is as likely to have been a mere formal act, as not; whereas, in the other case, the party, being an executor, is presumed to have done the act involving responsibility; because he has done that which an executor who has not actually received the money, is not called upon to do. (As to these passages respecting acts and defaults for which a trustee or other person standing in a fiduciary relation is responsible, see St. § 1280, 1280 a, and note; 2 Sp. 928, 929, 932.)

XIV. "Every person who acquires personal assets by a breach of trust or a *devastavit* by an executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying, or receiving as a pledge, for money advanced to the executor at the time,

XIV. Breach of trust by an executor.



TIT. II. any part of the personal assets, even know-  
 CAP. VII. ing them to be such, whether specifically  
 — given by the will or otherwise; because the  
 sale or pledge is held to be *primâ facie* con-  
 sistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying, or receiving in pledge, any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledging is *primâ facie* inconsistent with the duty of an executor." (*Per* Sir John Leach, in *Keane v. Roberts*, 4 Mad. 357, cited St. § 580; see also 2 Sp. 373-4, 379.) And if an executor or administrator disposes of assets without a valuable consideration, the assets may be followed in specie, if distinguishable: but if the property so transferred is money and not distinguishable, and the person taking it knew it to be part of a testator's or intestate's estate, the creditors, legatees, or next of kin, have a personal demand against the executor, to the amount of the assets so disposed of. (2 Sp. 379.)

XV. Joint  
 breach of  
 trust.

XV. Where executors or trustees are jointly implicated in a breach of trust, all of them should, if possible, be brought before the Court, and should be made to contribute



proportionably. (See Observations of L. C. TIT. II. CAP. VII.  
 B. Richards, *In re Chertsey Market*, 6 Price, 278; *Perry v. Knott*, 4 Beav. 179; *Munch v. Cockerell*, 8 Sim. 219. But see *contra*, *Ex parte Angle*, Barn. 425.)

But each of the trustees, who are jointly implicated in a breach of trust, is responsible for the entire loss, and liable to make it good (as in certain cases we have already noticed); so that the *cestui que trust* may, in case of need, proceed against any or either of them singly or separately, even against the less guilty. (See *Walker v. Symonds*, 3 Swans. 75—78; *Bradwell v. Catchpole*, ib. 78, note. See also 32nd Order of August, 1841, and *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Kellawny v. Johnson*, 5 Beav. 319; *Perry v. Knott*, 4 Beav. 179; 5 Beav. 293; 2 Sp. 941.) And in such case, the trustee or trustees, who may be so singly or separately compelled to make good the loss, may seek contribution from the others or other of them in another suit. (See Lord Eldon's judgment in *Walker v. Symonds*, 3 Swans. 76—78; 2 Sp. 941.)

XVI. If *cestui que trust* has for a long time acquiesced in the misconduct of his trustee, with full knowledge of it, a Court XVI. Acquiescence in a breach of trust.

TIT. II. of Equity will not relieve him; for, *vigilantibus, non dormientibus, æquitas subvenit.*  
 CAP. VII.  
 — (St. § 1284 a.)

XVII. Debt  
by breach of  
trust is a  
simple con-  
tract debt.

XVII. The debt created by a breach of trust is only regarded as a simple contract debt, both at Law and in Equity, even where the trust arises under a deed executed by the trustees; unless the trustee who committed such breach of trust has acknowledged the debt under seal (St. § 1285, 1286; 2 Sp. 936); or unless by deed he has agreed or declared that he will execute the trusts. (*Lynch v. Grant*, 2 Drewry, 312.)

XVIII.  
Power of  
trustee to  
bind the  
estate by a  
sale, &c.

XVIII. A trustee may bind the estate by a conveyance to a *bonâ fide* purchaser, who had no notice at the time of paying his purchase money (St. § 1264, and note); because, in that case, as we have seen, the trust is virtually extinguished by the countervailing Equity of the *bonâ fide* purchaser. But if afterwards the trustee re-purchases or otherwise becomes entitled to the same property, the trust revives and re-attaches in his hands. (St. § 1264.)

The trustee may also bind the estate by a *bonâ fide* mortgage, or other specific lien, without notice of the trust. But the trust property will not be bound by any judgment

or any other claim of creditors against the trustee. (St. § 977.)

TIT. II.  
CAP. VII.

If, however, for a great number of years a trust for raising money remains unperformed, and a sale or mortgage is proposed to be made by the trustees, without an apparent reason for the sale or mortgage, and without the concurrence of the parties who are in possession and receipt of the rents, the purchaser or mortgagee is under some obligation to inquire and see whether the transaction is or is not a breach of trust. (*Stroughill v. Anstey*, 1 De Gex, Mac. & Gord. 654.)

XIX. An executor or administrator is personally liable for the payment of debts in respect and to the extent of the personal assets, and it is his primary and paramount duty, with all convenient speed, to pay the debts out of the personal estate. And hence if the assets be sold or aliened by the executors or administrators, or any one of them, for valuable consideration, the creditors cannot follow them; they are absolutely vested in the purchaser. (2 Sp. 372, 373.)

XIX. Liability, duty and power of executor.

If an executor has paid away the residue in ignorance of the existence of any debt, he is still liable. (2 Sp. 921.)

TIT. II.  
CAP. VII.

XX. Trustees  
to support  
contingent  
remainders.

XX. Trustees to support contingent remainders are peculiarly considered as honorary trustees for the benefit of the family, and as entitled to exercise a discretion for that purpose. And hence a Court of Equity, except in special cases, will not order them to join in conveyances which may affect or destroy the remainders. And, on the other hand, in those instances where they have so joined, after the first tenant in tail attained his majority, no judge in Equity has gone the length of holding that he would punish them as for a breach of trust, even in a case where a Court of Equity would not have directed them to join. Where, however, before the first tenant in tail is of age, trustees join in destroying the remainders, they are liable for a breach of trust; and so is every purchaser under them, with notice. (St. § 995—997.) In some few cases, Courts of Equity have compelled such trustees to join in conveyances which may affect or destroy the remainders, under peculiar circumstances of pressure to discharge incumbrances prior to the settlement: or in favor of creditors, where the settlement was voluntary; or for the advantage of persons who were the first objects of the settlement; as,

for example, to enable the first son to make a settlement on an advantageous marriage. TIT. II. CAP. VII.  
(St. § 995.)

XXI. Courts of Equity will assist the trustees, and protect them in the due performance of the trust, whenever they ask the aid and direction of the Court, as to the establishment, the management, or the execution of it. (St. § 961.) And in all cases of doubt, it is best to ask for the direction of the Court. (St. § 1276, note.) XXI. Equity will aid and direct trustees.

A trustee who commits a plain breach of trust is not protected from its consequences by the circumstance that he honestly took and followed the advice and opinion of his solicitor, whatever remedy he may have against his solicitor (2 Sp. 919), or that he committed it with the view of saving his *cestui que trust* from ruin. (See 2 Sp. 920.) A married woman, who by her entreaties has persuaded a trustee to commit a breach of trust to rescue her husband and family from ruin, has shortly afterwards made the trustee liable for that breach of trust by filing a bill against him. (2 Sp. 920.) Safety of trustees.

A trustee is not, in all cases, to be made liable upon the mere ground of his having deviated from the strict letter of his trust ;

TIT. II. for the deviation may be necessary or bene-  
 CAP. VII. ficial. But when a trustee ventures to deviate  
 — from the letter of his trust, he does so under  
 the obligation and at the peril of afterwards  
 satisfying the Court, that the deviation was  
 necessary or beneficial. (*Harrison v. Randall*,  
 9 Hare, 407.)

It is impossible ever to pronounce that a  
 trustee or executor, whatever precautions he  
 may have taken, is safe from personal risk,  
 unless he has acted in the execution of the  
 trust under the directions of the Court of  
 Chancery. (2 Sp. 49.)

XXII. Muni-  
 cements of  
 title.

XXII. A trustee is entitled to have the  
 muniments of title, and, in fact, it is his duty  
 to keep them in his possession. (2 Sp. 46.)

Where there is any difficulty or danger as  
 regards the title deeds of a trust estate, or  
 the securities of a trust fund, the Court may  
 provide for every such emergency, by ordering  
 the deeds or the securities to be deposited in  
 Court. (2 Sp. 46.)

XXIII.  
 Equity will  
 remove trus-  
 tees, and ap-  
 point others.

XXIII. If trustees are guilty of gross neg-  
 ligence, mismanagement, or misconduct, or if  
 from any cause there is a failure of trustees  
 qualified and willing to act, new trustees will  
 be substituted by the Court. (St. § 1287,  
 1289.) And it has even removed a joint

trustee from a trust who wished to continue in it, on the mere ground that the other trustees would not act with him; because, if he were not removed, irreparable mischief might happen to the trust property or the *cestui que trust*. (St. § 1288; 2 Sp. 943.)

TIT. II.  
CAP. VII.  
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XXIV. In the case of a charitable trust, it seems the Court will direct a power to appoint new trustees prospectively to be inserted in a deed appointing new trustees; but not in the case of a private trust, unless it is authorized by the instrument constituting the trust. (2 Sp. 37.)

XXIV. In-  
sertion of  
power to ap-  
point new  
trustees.

XXV. Before the stat. 1 Vict. c. 26, ss. 30, 31, trustees took the inheritance, where it was necessary, for the purpose of a trust created by will, that under a devise to them they should take the inheritance. And in the case of a devise to trustees for sale, though only a part of the inheritance was required to be sold, yet the Court considered them as trustees of the whole inheritance. (2 Sp. 295.)

XXV. Where  
trustees took  
the fee.

XXVI. When all the duties of a trustee are at an end, and this is clearly shown to him, and he has no notice of any disposition or incumbrances made by the *cestui que trust*, he must, on demand, convey the legal estate to his *cestui que trust*, at the peril of paying

XXVI. Con-  
veyance of  
legal estate  
to *cestui que  
trust*.



TIT. II. the costs of any suit occasioned by his refusal. In cases of real doubt or difficulty, a trustee, before he parts with his estate, is fully justified in requiring an indemnity from his *cestuis que trust*, or in seeking the directions and indemnity of the Court (a). (2 Sp. 48.)

XXVII. Settlement of accounts.

XXVII. A trustee is entitled to have his accounts examined, and to have a settlement of them. He is also bound to give an account, if demanded, and to be always ready with his accounts. If the *cestui que trust* is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release, though the trustee cannot oblige the *cestui que trust* to give a release under seal. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to require to have the accounts taken. He is not at liberty not to adopt either course, and keep a Chancery suit hanging for an indefinite time over the head of the trustee. (2 Sp. 46, 47, 921.)

(a) On the subject of Trusts and Trustees, see stat. 1 Will. IV. c. 60; 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; and 10 & 11 Vict. c. 96.



A trustee or executor is bound to render every necessary information, and, if he have not all the necessary information, he is bound to seek for it, and, if practicable, to obtain it. (2 Sp. 921.)

TIT. II.  
CAP. VII.  

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Duty of rendering information.

## CHAPTER VIII.

## OF THE SPECIFIC PERFORMANCE OF AGREEMENTS AND DUTIES NOT ARISING FROM TRUSTS.

I. Remedy at law. I. By the Common Law, if a party who ought to perform a contract or covenant, fails to do so, no redress could be had, except in damages. (St. § 714.)

II. A specific performance will be decreed in equity, where damages would not afford compensation. II. In Equity a specific performance of a contract, covenant, or duty, will be decreed, where damages would not afford an exact compensation for the non-performance thereof, whatever may be the form or character of the instrument containing such contract or covenant, or giving rise to such duty. And hence it will be decreed in all cases of contracts respecting land: because the local character, vicinage, soil, easements, or accommodations of the land, may give it a peculiar value in the eyes of the purchaser, so that damages, which would enable the purchaser to buy other land, of the very same marketable value, would not or might not be

a complete compensation. And if a bond is entered into, with a penalty, Equity will not regard it as an option to do the act required or pay the penalty, but as an agreement to do the act at all events, of which it will enforce a specific performance. (St. § 715, 717, 718, 739—742, 746, 751, 783—786, 850, 1425.)

TIT. II.  
CAP. VIII.  
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III. But Equity will not interfere where damages at Law would amount to a complete compensation. Hence a performance of a contract for the sale of stock or goods will not be enforced in ordinary cases; because damages at Law, calculated on the marketable price of the stock or goods, are generally equivalent, in point of value, to the delivery of the stock or goods contracted for; inasmuch as, with the damages, the purchaser may ordinarily buy stock or goods of the same kind and of the same value to himself. (St. § 717, 718, 746.) But a performance of a contract respecting stock, goods, or personal property, will be enforced where damages at Law could not afford a complete compensation. (St. § 717—720.) And where the specific performance of a contract respecting chattels will be decreed on the application of one party, on the ground that damages

III. Not  
where they  
would afford  
a complete  
compensation.

TIT. II. would not be a complete compensation to  
CAP. VIII. him, Equity will entertain the like suit at the  
— instance of the other party, though the relief  
sought by him is merely in the nature of a  
compensation in damages or value: for, in  
all cases of this sort, the Court acts on the  
ground that the remedy ought to be mutual.  
(St. § 723.) The same rules apply to agree-  
ments respecting personal acts, for the non-  
performance of which an exact compensation  
may sometimes be made by way of damages,  
while in others it cannot. (St. 722—729.)

IV. At law,  
contracts and  
covenants  
are con-  
sidered  
merely as  
personal and  
executory,

but in  
equity, as  
performed,  
in regard to  
conse-  
quences.

IV. At Law, contracts and covenants to  
sell, convey, or transfer land or other pro-  
perty, are considered simply as personal and  
executory contracts and covenants, and not  
as attaching to the property in any manner  
as a present or future charge or otherwise.  
(See St. § 714, 790.) But in Equity, from the  
time of a contract for the sale of land, the  
vendor, and his heirs, and any one claiming  
as a subsequent purchaser under him, become,  
as to the land, trustees for the purchaser and  
his heirs, devisees, or vendees; and the pur-  
chaser and his personal representatives be-  
come, as to the money, trustees for the vendor  
and his personal representatives. (St. § 788,  
789, 790.)

In like manner, land articted, conveyed, or devised to be sold and turned into money, is reputed as money; and money articted or bequeathed to be invested in land, has in Equity many of the qualities of real estate, and in particular is descendible and devisable as such. (St. § 790.) But the person for whose benefit the conversion is to be made, may elect to take the property in its unconverted state. And this election he may make as well by acts or declarations clearly indicating a determination to that effect, as by an application to a Court of Equity. (St. § 793, 1213.)

TIT. II.  
CAP. VIII.

Land articted or devised to be sold, and money articted or bequeathed to be invested in land.

In general, Courts of Equity do not incline to change the quality of the property as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite and different character. (St. § 1214, 1214 a.)

V. Where the specific execution of a contract respecting lands would have been decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, representation, or title, unless other controlling equities have intervened. (St. § 788.) And where the heir of the purchaser's heir may

V. Specific performance decreed between persons claiming under the parties.

Purchaser's heir may

TIT. II.  
CAP. VIII.

—  
require the  
money to be  
paid out of  
the personal  
estate.

chaser comes into Equity for a specific performance, he may in general require the purchase-money to be paid out of the personal estate of the purchaser in the hands of his personal representatives. (St. § 790.)

VI. Non-compliance with terms of agreement in non-essential particulars,

or slight misdescription.

VI. If the terms of an agreement, either through negligence or otherwise, have not been complied with in particulars which do not pertain to the essence of the contract, or if there has been a slight misdescription of the property, Courts of Equity will nevertheless decree a specific performance in favor of the party chargeable with the non-compliance or misdescription, if compensation can be made for any injury that may have been occasioned by the non-compliance or for the misdescription of the property. (See St. § 747, 748, 771, 775—777, and notes.)

At Law, time is of the essence of the contract. But in Equity it is held to be of the essence of the contract only in cases of direct stipulation that it shall be so considered, or where it is obviously so from the nature of the case; as where a reversion is sold, or where the property sold is required for some immediate purpose, as trade or manufacture, or is in its nature of a fluctuating value, or is of a determinable character, as an estate for

life, or the dealing is with an ecclesiastical corporation. (*Parkin v. Thorold*, 16 Beav. 65; Sugd. C. V. 184, 189, 193.) And even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed. (Sugd. C. V. 94; St. § 776.) On the other hand, although time may not be originally of the essence of the contract, still either party may, by a proper notice, bind the other to complete within a reasonable time.

TIT. II.  
CAP. VIII.

VII. Where the bill is not by the vendor, but by the purchaser, and the vendor is incapable of making a complete title to all the property sold, or there has been a substantial misdescription in important particulars, or the terms have not been reasonably complied with on the part of the vendor, Courts of Equity will generally allow the purchaser to proceed with the purchase, *pro tanto*; that is, to have the contract specifically performed as far as the vendor can perform it, and to have an abatement made out of the purchase-money or a compensation. (St. § 779.)

VII. Want of title, or substantial misdescription, or want of reasonable compliance with agreement.

VIII. Where a man has performed a valuable part of an agreement, but is incapable of performing the remainder, by a subsequent accident, without any default on his part,

VIII. Accidental incapacity of performing the remainder of an agreement.

TIT. II.  
CAP. VIII.

Courts of Equity will enforce the agreement in his favor (allowing such compensation as may be just), in case he is not *in statu quo* as to the part which he has performed, but not otherwise. (St. § 772, 796, 797.)

IX. Performance *sub modo*.

IX. In some cases, a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscientious, but according to the change of circumstances. (St. § 775.)

X. Agreement not enforced, where the parties were incompetent to contract.

X. Of course an agreement entered into by parties incompetent to contract, such as infants and *femes covert*, will not be enforced against them. Nor will it be enforced in favor of such parties; because the remedy ought to be mutual. (St. § 787, 751, note.)

XI. Nor where the terms are not certain and definite.

XI. Nor will Courts of Equity enforce a contract, although it is written, if the terms are not certain and definite in themselves; for, in such a case, they might decree precisely what the parties did not intend; and besides this, if any terms are to be supplied, it must be by parol evidence; and the admission of such evidence would let in all the mischiefs intended to be guarded against by the Statute of Frauds. (St. § 767.)

XII. Nor, in general, in the absence

XII. Courts of Equity will enforce an obligation imposed by will, without any con-



sideration. (2 Sp. 255.) But they will not enforce either against the party himself or any volunteers claiming under him, any contract or any imperfect gifts *inter vivos* (not being donations *mortis causâ*), or imperfect assignments of debts or other property, or executory trusts raised by a covenant or agreement, or defective settlements or conveyances, which are not founded in a valuable consideration, even though the transaction be founded on a meritorious consideration, as in the case of a provision for a wife or child; that is, Equity will not enforce them so far as something is sought beyond what, if anything, may be recovered under them at Law; although it will, if necessary, give effect to any legal obligation created by them. But if the transfer, assignment, trust, settlement, or conveyance is complete, so that no act remains to be done to give full effect to the title, Equity will enforce it throughout against the party making or creating it, and his representatives, although it be merely voluntary. (St. § 433, 787, 793 a, b, 973; 1 Sp. 507; 2 Sp. 254, 255, 285, 889—893, 907, 909—912; *Voyle v. Hughes*, 2 Sm. & Gif. 18; *Bridge v. Bridge*, 16 Beav. 315; *Weale v. Ollive*, 17 Beav. 252; *Beech v. Keep*, 18 Beav. 285.) But

TIT. II.  
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—  
of a valuable  
considera-  
tion.

TIT. II. in general it cannot be laid down with certainty  
CAP. VIII. what particular acts are necessary to make an  
— assignment of a *chose in action*, or an equitable interest, not being an equitable estate, complete. (2 Sp. 907; see *Donaldson v. Donaldson*, 1 Kay, 711.) And hence, the surest way, short of a legal transfer, where that is practicable, of effecting a voluntary transfer, is by the party entitled not making an assignment, as such, but signing a declaration of trust in favor of the donee. (2 Sp. 898, 909, 913, 915. See *Kekewich v. Manning*, 1 D. M. & G. 176; *Beech v. Keep*, 18 Beav. 289, 292.) A third person, particularly if a relation, may enforce in Equity a stipulation made by another in his favor, and for which the party who obtained it has given a valuable consideration plainly with a view of benefiting such third person, though such third person, as regards each of the contracting parties, may be a volunteer (2 Sp. 286): as where a person who has contributed a valuable consideration to a settlement has exacted, as part of the contract, that certain property shall be so settled, as that the property, whether belonging to one of the parties or the other, shall go to some near relative, in the event of the intended limitation to the

issue of the marriage failing to take effect. TIT. II.  
CAP. VIII.  
(2 Sp. 281.) But it would appear that, if the party exacting the stipulation releases the other, the stranger cannot enforce it, unless his condition in life has been altered by the stipulation. (See 2 Sp. 280, 281.)

XIII. Equity will not interfere, (1.) Where, XIII. Nor when it would be morally wrong or inequitable.  
in ordinary cases, the contract has become incapable of being substantially performed on the part of the person seeking relief. (St. § 736.) (2.) If the plaintiff has been guilty of any negligence affecting the essence of the contract (St. § 771); or if specific performance is sought by a purchaser, after he has permitted a long time to elapse, without evincing a fixed intention to carry his contract into execution, although he may have paid part of the purchase-money, or after he has made frivolous objections to the title, and trifled or shown a backwardness to perform his part of the agreement, especially if circumstances are altered. (Sugd. C. V. 189.) (3.) If there is a substantial defect in the title of the whole or the principal part of the property, not remediable before the decree. (4.) If there is a substantial error in the description of the estate, which was unknown to the purchaser, and in regard to which, he was not put upon

TIT. II. inquiry. (See St. § 778.) (5.) If the title  
CAP. VIII. is doubtful: and a doubtful title is one on  
— which the Court either itself entertains doubt,  
or considers that other competent persons  
may reasonably entertain doubt, although the  
Court itself may have a favorable opinion of  
the title; for the Court has no means of set-  
tling the question as against adverse claim-  
ants, or of indemnifying the purchaser, if its  
own opinion should turn out not to be well  
founded. (*Pyrke v. Waddingham*, 10 Hare,  
7, 10.) (6.) If the character and condition  
of the property has been so altered, that the  
terms of the contract are no longer applicable  
to the existing state of things. (St. § 750.)  
(7.) If the defendant can show, that, by fraud  
or mistake, the thing bought is different from  
what he intended. (8.) If the estate bought  
is of a different tenure, as when it was de-  
scribed as freehold, when in fact it is copy-  
hold, or *vice versâ* (*Ayles v. Cox*, 16 Beav.  
23); or where it was described to be free-  
hold, when in fact it is leasehold. (Sugd. C.  
V. 212.) (9.) If material terms have been  
omitted in the written agreement, or there has  
been a variation of it by parol. (St. § 770.)  
(10.) If the contract is founded in imposition,  
misrepresentation, undue influence, or fraud

of any kind. (11.) If after the day fixed for performance is passed, specific performance is sought by the purchaser, and the price is inadequate, or by the vendor, and the price is unreasonable. (Sugd. C. V. 189.) Or if, on any other account, it would be morally wrong or inequitable to enforce performance thereof. (St. § 750, 750 a, 751 a, 769, 787.)

TIT. II.  
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XIV. In like manner, Equity will not enforce agreements, contracts, or covenants which are against public policy. And hence,

XIV. Nor will equity enforce assignments, contracts, or covenants, against public policy, as in the case of,

1. An officer in the army or navy, or other officer of the government, cannot assign his future accruing pay, or other remuneration connected with the right of the government to *future* services from him; because it is contrary to the honor, dignity, and interest of the State, that its servants should be in danger of being reduced to poverty by anticipating those resources which were intended to place them in a suitable condition of respectability, comfort, and efficiency. (See St. § 769, 1040 c—1040 f, and notes; 2 Sp. 867.) But a man may assign a pension given him entirely for past services; and prize-money may be assigned. (2 Sp. 867.)

1. Assignments by officers of the government.

2. So, on principles of public policy, Equity will not uphold assignments which

2. And those involving champerty, maintenance,

TIT. II.  
CAP. VIII.

—  
or buying of  
pretended  
titles.

involve champerty, or maintenance, or buying of pretended titles. (St. § 1049; see *Reynell v. Sprye*, 1 D. M. & G. 660.) Champerty (*campi partitio*) is properly a bargain between a plaintiff or defendant in a cause and another person who has no interest in the subject in dispute (*campum partire*), to divide the land or other property sued for between them, if they prevail at Law, in consideration of the other person carrying on the suit at his own expense. Maintenance, of which champerty is a species, is properly an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. Each of these is punishable, both at the Common Law and by Statute, as tending to keep alive strife and contention, and to pervert the remedial process of the law into an engine of oppression. And the Stat. 32 Hen. VIII. c. 9, prohibits the transfer of any right or title to hereditaments, unless the seller, or his ancestor, or those by whom he claims, have been in possession of the same, or of the remainder or reversion thereof, or of the rents and profits thereof, for one year next before the sale. (St. § 1048, and note, and

1048 a; 2 Sp. 869.) And Courts of Equity enforce all the principles of Law upon these points. Exceptions are made, however, to the general rule against champerty and maintenance, in the case of father and son, or of an heir apparent, or of the husband of an heiress, or of a master and servant, or the like. (St. § 1049; 2 Sp. 870, 871.)

3. Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, Equity will not enforce the assignment of a mere naked right to litigate, that is, a right, which, from its very nature, is incapable of conferring any benefit except through the medium of a suit; such as a mere naked right to set aside a conveyance for fraud. (St. § 1040 g, and note; 2 Sp. 868, 869, 872.) But a person may take an assignment of the whole interest of another in a contract, or security, or property which is in litigation, provided he does not make any advance beyond the mere support of the interest which he has so acquired. Thus, notwithstanding the Statute 32 Hen. VIII. c. 9, above referred to, an equitable interest under a disputed contract for the purchase of real estate may be the subject of a sale. If such an interest is sold

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3. Nor assignments of mere naked rights to litigate.



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by the purchaser under such original contract, he becomes in Equity a trustee for his sub-purchaser, and must permit the sub-purchaser to use his name in legal proceedings for obtaining the benefit of the contract. And without entering into any covenants for the purpose, such sub-purchaser is obliged to indemnify the original purchaser from all the acts which he must do for the sub-purchaser's benefit. And so, a creditor may assign his interest in a debt, although he may have commenced a suit to recover it. (St. § 1050—1054; 2 Sp. 863, 868—871.) In these cases there is an actual interest in the assignor, independently of litigation; and although it may require continued litigation to enforce it, yet the parties may possibly adjust the matter without further proceedings; whereas, in the case first mentioned, there is no interest in the assignor, or none but what may result from oversetting an interest in the other party.

4. Common law rule against assignment of possibilities, or things in action,

4. It is a rule of the Common Law, that no possibility, right, title, or thing in action, can be granted to third persons, except in the case of the Sovereign, to whom and by whom an assignment could always be made; for it was thought that a different rule would be the



means of multiplying contests and suits. And, at Law, this still continues to be the general rule, except in the case of negotiable instruments and some few other securities, or where a debtor assents to the transfer of a debt, so as to enable the assignee to maintain a direct action against him, on the implied promise which results from such assent; and except in the case of possibilities coupled with an interest and contingent interests in real estate, which may now be granted and assigned at Law in consequence of the Stat. 8 & 9 Vict. c. 106. (St. § 1039; 2 Sp. 850, 851, 855.) And in the case of assignments of bond or other debts which are an exception to the above-mentioned rule, it is necessary to sue in the name of the original creditor; the person to whom it is transferred being regarded rather as an attorney than as an assignee. (St. § 1056.)

Even before the late Statute of Wills, a devise of a possibility coupled with an interest, or of a contingent interest, whether in real or personal estate, was good at Law. (2 Sp. 854.) And a covenant to settle, charge, dispose of, or affect property to be hereafter acquired, will operate in Equity upon the property so afterwards acquired. (2 Sp. 254.)

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is not  
adopted in  
equity.

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And Courts of Equity give effect to assignments, for valuable consideration, of trusts and possibilities of trusts, and contingent interests, whether in real or personal estate, contingent gains, such as freight to be earned, or a cargo to be procured, and even mere expectancies of heirs to their ancestor's estate, and *choses in action*. For, such assignments of a *chose in action* are considered in Equity as amounting to an agreement to permit the assignee to make use of the name of the assignor at Law, in order to recover the debt, or to reduce the property into possession; or as a contract entitling the assignee to sue in Equity in his own name, and enforce payment of the debt directly against the debtor, whether he has assented or not, making him, as well as the assignor, if necessary, a party to the bill. (See St. § 1040, 1040 c, 1044, 1055, 1057; 2 Sp. 852, 865, 866, 896.) And such assignments of contingent interests, possibilities, and expectancies, are regarded in Equity as amounting to a contract to assign, when the interest becomes vested; and when the interest does so become vested, the claim of the assignee is enforced, not indeed as a trust, but as a right under a contract. (St. § 1040 b.)

As a general rule, any thing written, said, or done, in pursuance of an agreement, and for valuable consideration, or in consideration of an antecedent debt, to place a *chose in action* or fund out of the control of the owner, and appropriate it in favor of another person, amounts to an equitable assignment. (2 Sp. 855, 860, 861, 907.) So that an agreement between a debtor and a creditor, that the debt shall be paid out of a specific fund coming to the debtor, will operate as an equitable assignment. And an order given by a debtor to his creditor upon a person owing money to such debtor, or holding funds belonging to him, directing such person to pay the creditor out of such money or funds, will amount to an irrevocable equitable assignment of such money or funds, or a sufficient part thereof, if made in consequence of a direct agreement. (Row v. Dawson, 1 Ves. 331; *Ex parte South*, 2 Swanst. 392; Lett v. Morris, 4 Simons, 607; Burn v. Calvallo, 4 My. & Cr. 690; L'Estrange v. L'Estrange, 13 Beav. 281; *Ex parte Steward*, 2 M. D. & De Gex, 265; Rodick v. Gandell, 1 D. M. & G. 777; Diplock v. Hammond, 2 Sm. & Gif. 141; 2 W. R. 501; Watson v. Duke of Wellington, 1 Russ. & My. 602; Malcolm v. Scott, 2

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What  
amounts to  
an assign-  
ment.

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Hare, 39; 2 Spence, Eq. Jur. 855, 860, 861, 907; Coote, Mortg. 3rd ed. 234.) But where a railway company was indebted to their engineer, who was greatly indebted to his banker, the latter having pressed for payment or security, the engineer, by letters to the solicitors of the company, authorized them to receive the money due to him from the company, and requested them to pay it to the banker, and the solicitors by letter promised the banker to pay him such money on receiving it; it was held that this did not amount to an equitable assignment of the debt. (*Rodick v. Gandell*, 1 D. M. & G. 763.) And where a consignment of property is made by the owner, not in consequence of any obligation or contract express or implied, but of his own motion, with orders to pay over the proceeds to a third person, this is not an irrevocable appropriation at Law or in Equity, though the third person be a creditor: nor is a merely voluntary arrangement made by the debtor himself for payment of a creditor out of a particular fund, though communicated to the creditor, absolutely binding so that it cannot be revoked, that is, in the absence of special circumstances, as forbearance and the like on the part of the creditor,

so as to raise a case of contract or of fraud. TIT. II.  
CAP. VIII.  
(2 Sp. 862.)

In order to prevent payment to the assignor himself, and in order to acquire by assignment a complete title to a *chose in action*, as against assignees in bankruptcy or insolvency, or subsequent purchasers or incumbrancers, every thing must be done towards the obtaining of quasi-possession that the subject admits of. Hence notice of the assignment of a debt should be given to a debtor; and if a bond is assigned, it ought to be delivered over to the assignee. (St. § 1047; 2 Sp. 855—857.) In all assignments of equitable interests, other than equitable estates, he who gives notice to the holder of the fund has priority over him who does not. Notice to one of several obligors or trustees is sufficient. Where stock standing in the name of a trustee is assigned, and notice cannot be given to the trustee, he who first obtains a *distringas* on the stock will have a priority. Where a sum standing in the name of trustees is given by a testator as a specific legacy, the executor not having assented to the legacy, the incumbrancer under the specific legatee who first gives notice to the executors is entitled to priority. (2 Sp. 857, 858.)

Important to  
give notice of  
assignment.

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Payments to  
assignee of a  
debt.

When a debt not legally assignable has been equitably assigned by the creditor to a purchaser for valuable consideration, and the debtor has had notice of the assignment, all payments which he may thereafter make to the purchaser on account of the debt must be considered to be well made, so far, at least, as the debtor is concerned, notwithstanding that the purchaser may in fact, after notice of his purchase to the debtor, have sold or mortgaged the debt to some other person, provided that the payments were made by the debtor without notice of the latter sale or mortgage. Nor, in such a case, is it incumbent on him, before making a payment to the original purchaser, to require production or proof of the original assignment. (*Stocks v. Dobson*, 4 De Gex, M. & G. 11, 17.)

Assignees  
taking sub-  
ject to  
equities of  
assignor.

As a general rule, an assignee of a *chose in action*, other than a bill of exchange or a note, takes it subject to the same equities as it was liable to in the hands of the assignor. (2 Sp. 863—865; *Mangles v. Dixon*, 3 Ho. of Lords, 702; *Smith v. Parker*, 16 Beav. 119.) And an assignee in insolvency stands on the same footing as a particular assignee. (*In re Atkinson*, 2 D. M. & G. 140.)

5. Again, Courts of Equity will not enforce the specific performance of an agreement to refer any matter ; deeming it against public policy to exclude any person from the appropriate judicial tribunals. Neither will they compel arbitrators to make an award. Nor when they have made an award, will they compel them to disclose the grounds of their judgment. (St. § 1457.)

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5. Interference in regard to arbitration.

Courts of Equity will enforce a specific performance of an award which is unexceptionable, and which has been acquiesced in by the parties. (St. § 1458, 1459.) And where an award has been for a long time acquiesced in or acted upon by both parties, even though objections might have been originally urged against it, an application to set it aside will not be entertained. (St. § 1459.)

XV. Courts of Equity will enforce a specific performance of a parol contract within the Statute of Frauds—

XV. Parol contracts enforced.

1. Where it is fully set forth in the bill, and it is admitted by the answer of the defendant, and the defendant does not insist on the Statute as a bar. For, under these circumstances, there can be no fraud. And,

1. When set forth by plaintiff, and admitted.



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CAP. VIII.

although there may indeed be a temptation to the defendant to commit perjury; yet that is the case with every answer, where the defendant's interest is concerned. And as the defendant does not insist on the Statute, he may be deemed to have waived it; and the rule is, *Quisque renuntiare potest juri pro se introducto*. (St. § 755—757, and notes.) But if the defendant insists on the Statute as a bar, although he confesses the agreement, Courts of Equity will not enforce it; for that would be contrary to the express provisions of the Statute. (St. § 757.)

2. Where the reducing it to writing was prevented by fraud.

2. Equity will also enforce such a parol agreement where it was intended to be reduced to writing according to the Statute, but that has been prevented by the fraud of one of the parties. (St. § 768.)

3. Where partly performed.

3. A parol agreement will also be enforced, whether it is an original agreement, or a variation of or substitute for a prior written agreement, where it is a completed agreement, and it has been partly carried into execution, and it is shown, by satisfactory evidence, to be clear, definite, and unequivocal in all its terms. (St. § 759, 764, 770,



note; *Lady E. Thynne v. Earl of Glengall*, TIT. II.  
CAP. VIII.  
2 Ho. of Lords, 158.)

As to the acts which will be deemed a part performance, they should be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement (St. § 762); and they must have put the party who has performed them in such a situation, that it would be a fraud, in the other party, after allowing him to do them, not fully to perform the agreement. (St. § 761; *Surcome v. Pinniger*, 3 D. M. & G. 571.) For, the ground on which Courts of Equity enforce specific performance in such cases, is, that if the party allowing these acts to be done were not obliged to fulfil the agreement, it would be permitting him to commit a fraud, the very crime which the Statute was designed to prevent. (St. § 759.) And hence a depositing, securing, or paying of the purchase money will not be deemed such a part performance as will take the case out of the Statute; for the money can be recovered back at Law. (St. § 760.) Nor will the delivery of an abstract of title, giving directions for conveyances, going to view the

What is  
deemed a  
part per-  
formance.

TIT. II.  
CAP. VIII.

estate, fixing upon an appraiser to value stock, making valuations or admeasurements, registering conveyances, and acts of the like preliminary or ancillary and equivocal character, be considered as a part performance of the agreement, so as to take it out of the Statute. (St. § 762.) But if upon a parol agreement the purchaser is admitted into possession, and such possession is exclusively referable to the contract, this amounts to a part performance which will take the case out of the Statute ; because he is made a trespasser, and is liable to answer as such, if there is no valid agreement at Law or in Equity. (St. § 761, 763.)

XVI. Parol  
variations  
or additions.

XVI. With respect to a parol variation or addition, it is to be observed that evidence of it is totally inadmissible at Law ; and that the most unequivocal proofs of it will be required in Equity ; and in general, it will only be allowed to be used by a defendant in resisting a specific performance ; not by a plaintiff in compelling such performance. The reason of this distinction is, that the Statute does not say that a written agreement shall bind, so as to prevent a defendant from insisting on a parol variation thereof, but only that a parol agreement shall not bind. Ex-

ceptions occur, however, to this doctrine of the inability of a plaintiff to make use of a parol variation. (1.) Where there has been such a part performance of the parol portion of the agreement, as would enable the Court to decree a specific performance in the case of an original and independent agreement. (2.) Where an omission has occurred by fraud; and, in cases not within the Statute of Frauds, where there has been a clear omission by mistake. (3.) Where the defendant sets up a parol variation or addition, and the plaintiff seeks a specific performance of the contract with such variation or addition. (See St. § 770, note, and 770 a.)

XVII. Where a person intends to make certain provisions, gifts, or arrangements, for the benefit of others, but omits to do so, on the faith of a promise by another person to carry into effect what was so intended, such a promise will be specifically enforced in Equity. So that where an executor promised a testator that he would pay a legacy, and told the testator he need not put it in his will, the executor was decreed specifically to perform the promise. (St. § 781.)

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CAP. VIII.

XVII. Parol  
promise en-  
forced.

TIT. II.  
CAP. VIII.

XVIII. Ne-  
gative agree-  
ments.

XVIII. There are many cases where the agreement is merely negative, and the Court acts merely by injunction; as in the case of a covenant not to dig gravel. These may more properly be termed cases of decrees for specific adherence to agreements. (See St. § 721.)

XIX. Pay-  
ment of  
penalty.

XIX. A person cannot evade performance of his contract by payment of the penalty for the breach of it. (2 Sp. 254.)

## TITLE III.



Of Adjustive Equity.

## CHAPTER I.

## OF ACCOUNT IN GENERAL.

Jurisdiction  
of equity.

IN matters of account standing on equitable claims, Equity has universal and exclusive jurisdiction. (St. § 454.) In matters of account growing out of privity of contract, and cognizable at Law, Courts of Equity have a general jurisdiction, where there are mutual and complicated accounts, and also where the accounts are on one side, but they are very complicated and intricate, or a remedy which is or was peculiar to a Court of Equity is required. But when the accounts, whether receipts or payments, or both, are all on one side, or where there is a single matter on the side of the plaintiff, and mere set-off on the other side, and where, in each case, no complication exists, and no peculiar equitable remedy is sought or required, Courts of Equity will decline taking jurisdiction. (See St. § 454, 459, 511, 512; *Phillips v. Phillips*, 9 Hare, 270; *Fluker v. Taylor*, 3 Drew. 183, 192; *Padwick v. Hurst*, 18 Beav. 575.)

Accounts seem to be divided into open, stated, and settled accounts. TIT. III.  
CAP. I.

An open account seems to be an account of which the balance is not struck, or which is not accepted by both parties. Division of  
accounts.  
  
Open ac-  
ccounts.

A stated account is one that is accepted by both parties. This acceptance need not be expressed, but may be implied from circumstances; as, if no objection is made to the account within a reasonable time. What is a reasonable time, is to be determined by the habit of business; and the usual course is required to be followed, unless there are special circumstances constituting a ground for variation. Between merchants, acquiescence is presumed, under ordinary circumstances, after a lapse of several posts. (St. § 526.) Stated ac-  
ccounts.

It is ordinarily a good bar to a suit for an account, that the parties have already stated the items and struck the balance; for, under such circumstances, there is an adequate remedy in a Court of Law. But if there is any mistake, omission, accident, or fraud, by which the account stated is vitiated, and the balance is incorrectly fixed, a Court of Equity will interfere; in some cases, by directing the whole account to be opened and taken *de novo*; in others, by allowing it to A stated ac-  
ccount is ordi-  
narily a bar  
to a suit for  
an account.  
  
When it is  
not.  
  
Different  
modes of  
relief.

TIT. III.  
CAP. I.

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Meaning of  
"surcharge"  
and "falsify."

*Onus probandi.*

Extent of the  
liberty to  
surcharge  
and falsify.

stand, with liberty to the plaintiff to surcharge and falsify, or by simply opening the account to contestation as to one or two items which are specially set forth by the plaintiff in the bill. (St. § 523.) The showing an omission for which credit ought to have been taken, is a surcharge; the proving an item to be wrongly inserted is a falsification. The *onus probandi* is always on the party having the liberty to surcharge and falsify; and the liberty extends to the examination, not only of errors of fact, but also of errors in Law. (St. § 525.)

Generally where an account has been settled, the rule is only to give liberty to surcharge and falsify the account, when errors of fact or of law are shown in the account; but where an account has been settled between a trustee and his *cestui que trust*, under circumstances of fraud or misrepresentation or undue influence used on the part of the trustee, there is scarcely any length of time that will prevent the Court from opening the account altogether. (St. § 527; 2 Sp. 942.)

Acquiescence in an account, even for a considerable time, does not of itself establish the fact of the account having been settled. (St. § 528.)



Where, however, the demand would have been cognizable at Law, Courts of Equity are governed by the Statute of Limitations. But when the demand is purely equitable, and the bar of the Statute is inoperative, they are sometimes regulated by the analogy of Law, and sometimes by their own inherent principles, not to entertain stale demands, and not to encourage laches or negligence, from the difficulty of doing entire justice when the transactions have become obscure, and from the consciousness that the repose of titles and the security of property are manifestly promoted by fully acting upon the maxim, *Vigilantibus, non dormientibus, jura subveniunt.* (St. § 529.)

TIT. III.  
CAP. I.

Lapse of  
time.

In the case of a running account, where there are various items of debt on one side, and various items of credit on the other side, occurring at different times, as in the case of a banking account, there, if neither party makes any appropriation of payments or credits, they are to be appropriated to the discharge of the items of debt antecedently due, in the order of time in which such items stand in the account. But the debtor has a right to appropriate any payment he makes to whichever debt he may choose. And where

Appropriation of payments.

TIT. III. there are no running accounts, and the debtor  
CAP. I. omits to make such appropriation, then the  
—— creditor has a right to appropriate the payment to such of the debts as he may choose.  
(St. § 459 a—459 g.)

Agent liable  
to account  
only to his  
principal.

An agent is not liable to account except to his principal; and the case of a charity forms no exception to the rule. (*Att.-Gen. v. Earl of Chesterfield*, 18 Beav. 596.)

## CHAPTER II.

### OF ADMINISTRATION.

I. IN cases of any complication or difficulty, the Court of Chancery has, practically speaking, almost an exclusive jurisdiction in the administration of assets and the distribution of the residue, founded on the notion of a constructive trust, or on some auxiliary ground, such as the necessity of compelling a discovery, or the consideration that the aid, if any, afforded at Common Law or in the Ecclesiastical Court, is not plain, adequate, and complete. (St. § 534—543.)

I. Jurisdiction.

II. The application for assistance is sometimes made by the executor or administrator himself, against the creditors generally, when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate except under the direction of a Court of Equity. Bills filed by executors or administrators are sometimes called bills for conformity, and are not encouraged, because they may be made use of

II. Bill or claim by executor or administrator.

TIT. III. unduly to keep creditors out of their money.  
 CAP. II. And for this reason on such a bill, the Court  
 will not interpose by way of injunction to  
 prohibit creditors from proceeding at Law,  
 until there has been a decree against the  
 executors or administrators to account. (St.  
 § 544, 545.)

III. Bill or  
 claim or  
 summons by  
 creditor.

III. But the aid of the Court is more  
 usually sought by creditors, which may be  
 either by a bill or claim, or by a mere sum-  
 mons. (St. § 546, Ord. I., April, 22, 1850,  
 st. 15 & 16 Vict. c. 86, s. 45.) And as a  
 decree in Equity is held of equal dignity and  
 importance with a judgment at Law, a decree  
 on a proceeding of this sort, being for the  
 benefit of all the creditors, makes them all  
 creditors by decree, on an equality with cre-  
 ditors by judgment, so as to exclude, from  
 the time of such decree, all preference in  
 favor of the latter. (St. § 547.) As soon as  
 the decree to account is made in such a suit  
 brought in behalf of all the creditors, the  
 executor or administrator is entitled to an  
 injunction out of Chancery to prevent legal  
 proceedings against him by any of the cre-  
 ditors, except under the direction of the  
 Court of Equity by which the decree was  
 made. (St. § 549.)

IV. Assets are divided into legal and equitable. Legal assets are property which the Law vests or would have vested in the executor or administrator, as such, for the payment of debts generally (St. § 551), whether the aid of a Court of Equity is necessary to reach the property or not. Equitable assets are property which would not have vested in the executor or administrator by Law, but vest in him for payment of debts generally, simply by virtue of an express disposition of the property, which must be carried into effect by a Court of Equity. (See St. § 551, 552; 2 Sp. 314, 315.) But equitable assets also include real property which the deceased had by will charged with payment of his debts, although liable for payment of them by Act of Parliament. (St. § 552 a.)

TIT. III.  
CAP. II.

IV. Division  
of assets.

Definition  
of legal  
assets.

Definition of  
equitable  
assets.

V. Courts of Equity follow the same rules in regard to legal assets, which are adopted by Courts of Law, and give the same priority to the different classes of creditors which is enjoyed at Law. And Equity recognises and enforces all antecedent liens, claims, and charges *in rem*, according to their priority, whether those charges are of a legal or an equitable nature, and whether the assets are

V. Admi-  
nistration of  
legal assets.

TIT. III. legal or equitable. (St. § 553.) But equitable  
CAP. II. assets, with the exception above men-

Adminis-  
tration of  
equitable as-  
sets.

Abatement  
of debts,

and legacies.

tioned, are distributed *pari passu* among all the creditors, without regard to the priority or dignity of the debts; and, after they are satisfied, among all the legatees or distributees. But if the fund is insufficient to pay all the debts, all the creditors must abate in proportion. And so if the fund, after payment of debts, is insufficient to pay all the legacies, they must all abate in proportion, unless some priority is specifically given by the testator to some legacies over others. (St. § 554—557; 2 Sp. 314.) But as between specific and pecuniary legatees, the loss is to fall wholly on the latter. (2 Sp. 343.) And charitable legacies now abate, as well as legacies of another kind. (St. § 1180.)

Operation of  
the Statute of  
Limitations  
as regards  
debts.

Debts actually barred by the Statute of Limitations are not included in a trust for payment of debts. But where a provision is made either by will or by deed, for payment of debts out of real estate, the statutory time will cease to run, in the former case, from the death of the testator, in the latter, from the date of the deed; because the creditor, the *cestui que trust*, is not to be barred by the

TIT. III.  
CAP. II.  
—

neglect of the trustee to do his duty. The same principle will apply where personal estate only is assigned in trust for payment of debts. But where the like trust is expressly created by will, it does not prevent the running of the statute; because the trust for payment of debts, with which every executor is clothed by law, has no such effect. Indeed, such an express trust is inoperative for any purpose. (2 Sp. 357.)

VI. Assets are now generally applied in the payment of debts in the following order: first, the general personal estate is applied, except under the circumstances presently mentioned. Secondly, any estate particularly devised simply for the payment of debts. Thirdly, estates descended. Fourthly, estates devised to particular devisees, but charged with the payment of debts. (St. § 577; 2 Sp. 817, 822—824.) Fifthly, lands comprised in a residuary devise. Sixthly, specific legacies and lands specifically devised. (Coote, Mortg. 3rd edit. 474.) Seventhly, freehold estates over which a testator has a general power of appointment, and which he appoints by his will. (*Fleming v. Buchanan*, 3 D. M. & G. 976.)

VI. Order of  
administra-  
tion of dif-  
ferent pro-  
perties in  
payment of  
debts.

TIT. III.

CAP. II.

Personal estate primarily applied, except,

The personal estate constitutes the primary and natural fund for payment of debts (2 Sp. 334), and will first be applied, except in these cases :

1. In the case of express words or plain intention to the contrary.

1. When there are express words or a plain intention of the testator to exonerate his personal estate. And to constitute such a plain intention, directions and expressions which do not necessarily imply more than that the real estate shall make good the deficiency, are not enough : there must appear upon the whole testamentary disposition, taken together, an intention so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal estate. (2 Sp. 336—341, 824; *Plenty v. West*, 16 Beav. 180.) And (1.) If the real estate is directed to be sold for payment of debts, and the personal estate is expressly bequeathed to legatees, then the personal estate will be exonerated by necessary implication. But neither of these circumstances, apart from the other and from circumstances affording similar implication of intention, would be a sufficient indication of an intention to exonerate the personal estate. For it is most probable that



TIT. III.  
CAP. II.  
—

a direction to sell real estate for the payment of debts, where no disposition is made of the personal estate, was intended to be followed only in the event of the personal estate proving insufficient for the purpose of paying the debts. And, on the other hand, it is most probable that a bequest of personal estate, not by way of specific legacy, where no provision is made for payment of debts out of the real estate, was made subject to the payment of debts out of such personal property. (2 Sp. 340, 341, 818, 823; 2 Wms. on Executors, 1452, 1453, Ed. 4.) (2.) So where a devise is made subject to a condition of paying off the incumbrances affecting the estate; or where only the residue of the proceeds of real estate, after payment of debts, is devised. (2 Sp. 334, 342.) As a general rule, no extrinsic evidence can be admitted to ascertain the intention to exonerate: so that the circumstances of the testator, and the amount of his personal estate and of the debts, cannot be taken into consideration. (2 Sp. 337.)

2. Where the debt, charge, or incumbrance is, in its own nature, real; as in the case of a jointure, or of pecuniary portions to be raised out of lands by the execution of a power, or of pecuniary portions to be raised

2. Where the debt or charge is real.

TIT. III.  
CAP. II.

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in favor of daughters, under a marriage settlement, out of lands vested in trustees for the purpose. And although, in either case, there may be also a personal covenant to raise the jointure or portions, such covenant will only be regarded as an additional security, not as the primary one. If there is no such personal covenant for the payment of the portions, but only a covenant to settle lands, and to raise a term of years out of the lands for securing the portions; in such a case, even though there be a bond to perform the covenant, the portions are not in any event payable out of the personal estate. A mortgage debt (except in the cases mentioned in the next two paragraphs) is not considered as in its own nature real, but is primarily payable out of the general personal estate of the testator, where it is not payable by the devisee. Where the mortgaged estate is devised *cum onere*, it is payable by the devisee. But the expression "subject to the mortgage," in the devise of a mortgaged estate, may be only descriptive of the estate, and not expressive of an intent that the devise is made *cum onere*. (2 Sp. 819.)

3. Or was not  
contracted by  
the person

3. Where the debt was not contracted by  
the person who died last seised or entitled,

but by some other person from whom he took it by descent, or from some other person from whom he purchased it, or from whom his vendor derived it. Thus, where a mortgage is created by an ancestor, and the mortgaged estate descends upon the heir, there, although the heir should enter into a collateral contract or covenant, or give security for payment of the mortgage, yet his personal estate would not be liable to be charged, in favor of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage. But it is different if he has done anything which raises a new and independent contract between him and the mortgagee, or has in any other way made the debt his own. (See St. § 571—576, 1003; 2 Sp. 334, 335, 336, 393, 394, 819, 824.)

TIT. III.  
CAP. II.

who died last  
seised or  
entitled.

4. By the statute 17 Vict. c. 113, it is enacted, that, "when any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the

4. In certain cases where a person dies entitled to land in mortgage after Dec. 31, 1854.

TIT. III.  
CAP. II.  
—

heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st January, 1855."

VII. Order of administration of different properties in payment of legacies and annuities.

VII. A legacy given generally is payable out of the personal estate only. Where a legacy or an annuity is given out of the real and personal estate, the personal estate is

first liable : but if the estate is directed to be sold, and to form, together with the personal estate, one fund, and the annuity or legacy is made payable out of the mass, then both are to be considered as liable *pari passu*. (2 Sp. 818.)

TIT. III.  
CAP. II.  
—

VIII. In the order of satisfaction, if the personal estate of the deceased is not sufficient for all purposes, creditors are preferred to legatees ; because it is to be presumed that a testator means to be just, by desiring his debts to be paid, before he is generous ; and the personal estate, as we have seen, is the natural fund for the payment of debts. Again, specific legatees are preferred to the heir, because the heir, instead of being expressly an object of the testator's regard, like the specific legatee, only takes by act of law. Specific legatees are also preferred to the devisee of real estate charged with specialties or with the payment of debts, and to residuary devisees of real estate. But general pecuniary legatees are not preferred to residuary devisees of real estate. Nor are specific devisees of lands, not charged with specialties or with the payment of debts, preferred to specific legatees ; but upon failure of the general personal estate, the specific devisees and specific

VIII. Order  
of satisfac-  
tion.

TIT. III.  
CAP. II.  
—

legatees shall each, according to the proportionate value of the benefits conferred on each, contribute to the payment of specialty debts. If a particular portion of the personal estate is bequeathed, subject to the payment of debts and legacies, as between the legatees, the residuary personal estate is exonerated, if there is a residuary bequest, but not where there is no gift of the residue. (2 Sp. 343.) As between a devisee of a mortgaged fee simple estate and a specific legatee of personalty, the devisee shall not have his mortgage paid by the specific legatee, but shall take the mortgaged estate *cum onere*. *A fortiori* a specific legatee of a mortgaged leasehold shall not have the mortgage wholly or partly paid off by specific legatees of other leaseholds. (2 Sp. 838.) Subject to the Stat. 17 Vict. c. 113, (*supra*, 227,) the devisee of mortgaged premises is preferred to the heir-at-law of descended estates; because the devisee is evidently an object of the testator's bounty. And, *à fortiori*, the devisee of premises not mortgaged is preferred to the heir-at-law. In case unincumbered lands and mortgaged lands are both specifically devised, but expressly after payment of all the debts, they are to contribute proportionably in discharge

of the mortgage. Where the equities of the legatees and devisees are equal, the Court remains neuter, and suffers the law to prevail. (See St. § 571; 2 Sp. 822, 832, 839.)

TIT. III.  
CAP. II.

But, subject to the Statute 17 Vict. c. 113, where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir-at-law or devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator, binding on him, is entitled (unless there is some other equity which repels the claim) to have the debt paid out of the personal assets in preference to the residuary legatees or distributees (St. § 571), because such charges are primarily payable out of personal estate.

Lands devised for or subject to the payment of debts are also liable to discharge a mortgage, in favor of the heir or devisee to whom the mortgaged lands may belong, unless the mortgaged lands are really devised *cum onere*. (St. § 571; 2 Sp. 822, and see p. 226, *supra*.)

IX. There are many cases in which parties, whose right at Law is confined to one fund, would fail to obtain the satisfaction of their just claims, if left to the course of Law, but are enabled to obtain full satisfaction thereof

IX. Marshal-  
ling of assets.



Trt. III.  
CAP. II.

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by means of a particular adjustment effected by Courts of Equity, termed the marshalling of assets. This may be defined to be, such an arrangement of the different funds of the common debtor of two or more creditors as may satisfy every claim, so far as, without injustice, such assets can be applied in satisfaction thereof, notwithstanding the claims of particular individuals to prior satisfaction out of some one or more of those funds. (See St. § 558, 560, 561; 2 Sp. 827.) So that if there are two or more different kinds of funds of the common debtor of several creditors, and at Law one can have recourse to either of those funds, while another is confined to one of them, the former shall either be compelled to seek satisfaction out of that fund to which the latter cannot resort, so far as it will extend, or the latter shall receive compensation out of that fund, in proportion to the amount which the former has unnecessarily taken from that which formed the only source of payment for the latter. (See St. § 558, 560, 562, 563; 2 Sp. 827, 828.)

Marshalling  
in favor of  
creditors of  
an inferior  
rank, or of  
legatees, or  
of a por-  
tionist, or

This plan is adopted with regard to mortgagees and other creditors of the superior kind, in favor of creditors of an inferior rank, or of legatees, (except residuary legatees,



where the residue is not exonerated, and legatees whose legacies are given out of a residue,) or of portionists, or of the heir-at-law, or of a devisee, and with regard to simple contract creditors, in favor of legatees. (See St. § 562—566, 570; 2 Sp. 410, 819, 820, 827, 829, 833.) Thus, legatees, with the above exceptions, are permitted to stand in the place of specialty creditors, against the real assets descended, or of a mortgagee who has exhausted the personal estate, whether the mortgage lands have descended to the heir-at-law, or have been devised to a devisee who is to take subject to the mortgage. And where a testator bequeaths legacies, and devises real estate in trust for, or subject to, payment of debts, and the personal estate is exhausted by creditors, the legatees are entitled to come upon the real estate. (*Surtees v. Perkin*, 19 Beav. 406; *Paterson v. Scott*, 1 D. M. & G. 531.) And in consequence of the Statute 3 & 4 W. IV. c. 104, which makes real estate liable to simple contract debts, though subject to a priority in favor of specialty debts, legatees are permitted to stand, in regard to land descended, in the place of simple contract creditors who have exhausted the personal estate, so as to pre-

TIT. III.  
CAP. II.

of the heir,  
or of a de-  
visee.

Legatees put  
in the place  
of mortga-  
gees and spe-  
cialty and  
simple con-  
tract credi-  
tors,

TIT. III. vent a satisfaction of the legacies. (St. § 566;  
CAP. II. 2 Sp. 830.) But residuary legatees, where  
— the residue is not exonerated, and legatees  
whose legacies are given out of a residue,  
have no such equity, for a residue of personal  
estate implies what remains after satisfying  
the charges upon it. (2 Sp. 820.) And the  
equity of legatees will not generally prevail  
against a devisee of the real estate not mort-  
gaged, whether he is a specific or a residuary  
devisee; for, between persons equally taking  
by the bounty of the testator, Equity will not  
interfere, unless the testator has clearly indi-  
cated some ground of preference or priority  
of the one to or over the other. (St. § 565;  
2 Sp. 820, 829, 830—832.)

but not of a  
devisee of  
real estate  
not mort-  
gaged.

Marshalling  
as between  
legacies  
charged on  
land and  
others not so  
charged.

Administra-  
tion in the  
case of cha-  
ritable lega-  
cies.

The same marshalling of assets takes place  
as between legacies charged on land and  
legacies not so charged. (St. § 566.) But  
assets will not be marshalled in favor of le-  
gatees, unless the legacies are given to pri-  
vate individuals for their own benefit. For,  
since the Statute 9 Geo. II. c. 36, legacies  
or bequests to charitable uses, payable out of  
real estate, or charged on real estate, or to  
arise from the sale of real estate, are utterly  
void. (St. § 569.) And Equity has in some  
modern cases refused to marshal the assets in

TIT. III.  
CAP. II.  

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favor of any charitable bequests, when given, either directly or by way of trust, out of a mixed fund of real and personal estate, by directing the debts and the other legacies to be paid out of the real estate, and reserving the personalty to fulfil the charitable bequests. The charity legacies have been considered as intended to be charged on the personal estate and the proceeds of real estate proportionately, like other legacies, as if no legal objection existed to applying the proceeds of the real estate to the charitable bequests; and as charity legacies cannot legally be charged on the proceeds of real estate, they have been held to fail as to that proportion which would have to come out of the proceeds of the real estate. (See St. § 569, 1180; 2 Sp. 233, 235.) In this instance, not only has the principle of favor to charities been discarded, but the Courts have, very improperly (as the writer humbly submits), acted upon a diametrically opposite principle. A testator has the power of directing the charity legacies to be paid out of the pure personalty, and the debts and private legacies out of the mixed personalty. (See Lord Langdale's judgment in the *Philanthropic Society v. Kemp*, 4 Beav. 581, and *Robinson v. Geldart*, 3 Mac. &

TIT. III.  
CAP. II.

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Gord. 735.) And where a testator expressly directs charity legacies to be paid exclusively out of his pure personalty, and the personalty savouring of realty is sufficient for the payment of legacies to individuals, and though the will does not throw the legacies to individuals upon the personalty savouring of realty, yet it does not purport to make those legacies payable at all out of the pure personalty, but gives them without reference to any particular fund, and the pure personalty is not sufficient or only sufficient for the payment of the charity legacies; the legacies to individuals ought to be paid out of the personalty savouring of realty, so as to leave the pure personalty for the payment of the charity legacies. (*Robinson v. Geldart*, 3 Mac. & Gord. 735, 747.) But even in the absence of such an express adjustment, the writer conceives that the Courts ought, in favor of charities, to have imputed to testators an intention that the charity legacies should be paid out of that fund alone out of which they lawfully might be paid.

Marshalling  
as between  
simple con-  
tract debts  
and a ven-  
dor's lien.

Marshalling of assets takes place as between simple contract creditors and a vendor of real estate, in respect of his lien for his unpaid purchase money. (St. § 564 a.) And

as against an heir, but not as against a devisee taking an estate purchased, legatees are entitled to have the assets marshalled, so as to give them the benefit of the vendor's lien. (2 Sp. 833.)

TIT. III.  
CAP. II.

On analogous grounds, if a specific legacy has been pledged or incumbered with mortgages or other charges by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated; and if the executor fails to perform that duty, the specific legatee is entitled to compensation out of the general assets. Indeed, the same principles apply to specific legatees as to devisees, in respect to the redemption of the subject-matter out of the general assets. (St. § 566 a; 2 Sp. 774.)

Redemption  
or exonera-  
tion of a spe-  
cific legacy.

Again, in order to preserve a widow's paraphernalia, which, with the exception of necessary apparel, is subject to debts, Equity will oblige creditors who are entitled to proceed against real assets or funds, to resort to such assets or funds, or will decree her compensation out of the same. (St. § 568; 2 Sp. 821, 829.)

Protection of  
a widow's  
parapher-  
nalia.

X. With regard to the assets of foreigners, it is to be observed, that in general where a domestic executor or administrator collects assets in a foreign country, without any

X. Assets  
collected in  
a foreign  
country by a  
domestic  
executor or  
administra-  
tor.

TIT. III.  
CAP. II.  
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letters of administration taken out, or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets to be administered here under the domestic administration. (St. § 583.)

Assets received by a foreign executor or administrator, and remitted here.

If property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator appointed here could not assert a claim to it here, either against the person in whose hands it happened to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary for the purpose of due administration here, would be to require it to be transferred or distributed after all claims against the foreign executor or administrator had been ascertained and settled abroad. (St. § 584.)

By what law administration of such assets is regulated.

In regard to marshalling of assets in the case of creditors, the administration is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derived his authority to collect them, and not by the law of the country where the deceased lived (St. § 585); because every nation has a right to protect itself and its citizens against foreign laws which are opposed to the policy of the nation,

and injurious to the interests of its citizens. (St. § 586.)

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CAP. II.  
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In cases of intestacy, the law of the domicile of the deceased determines the fund out of which debts shall be paid; and in cases of testacy, the intention of the testator. (St. § 587.)

The priorities of creditors are regulated by the domicile of the testator, although the personal assets may be situate and administered in another country. (*Wilson v. Lady Dunsany*, 18 Beav. 293.)



## CHAPTER III.

### OF MORTGAGES, PLEDGES, AND LIENS.

#### SECTION I.

#### *Of Legal Mortgages of Real Property.*

I. What may  
be mort-  
gaged.

I. GENERALLY every description of property, and every kind of interest in it, which is capable of absolute sale, may be the subject of a legal mortgage or its equivalent in Equity. (2 Sp. 614.)

II. What  
amounts to a  
mortgage,  
and what to a  
purchase  
with right of  
repurchase.

II. It may be considered as an almost universal rule, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears on the deed itself, or by any other instrument, or even by parol evidence, and whether directly or indirectly, it will ever after be considered in Equity as a mortgage, and therefore redeemable on the usual terms, though at the time of the loan, or as part of the same transaction, there may have been an express agreement between the parties that it shall not be redeemable, or that the right



of redemption shall be confined to a particular time or to a particular person or description of persons; for such an agreement will be void. (St. § 1018; 2 Sp. 618—623.) But there may be an absolute *bonâ fide* sale and conveyance, with a collateral agreement for repurchase and reconveyance on repayment of the purchase money, and such collateral agreement may either be introduced into the agreement for sale at the time, or may be made at a subsequent period (2 Sp. 619, 621); although where an agreement for a repurchase is contemporaneous with the agreement for purchase, it will usually be treated as meaning redemption. (2 Sp. 621, note a.)

If the money paid by the grantee would be a grossly inadequate price for the absolute purchase of the estate; if he was not let into immediate possession of the estate; if he accounted for the rents to the grantor, and only retained an amount equivalent to interest; or if the expense of preparing the deed of conveyance was borne by the grantor; each of these circumstances has been considered as evidence, showing, with more or less cogency, that the conveyance was intended merely by way of security. (2 Sp. 620, 622.)

A conveyance will not be deemed a mort-

TIT. III. gage or held to be a security only, though it  
CAP. III. be for an undervalue, if it be not so gross as  
SEC. I. — to show that necessity or pressure amounting  
to fraud could alone have induced the person  
to enter into such a contract, and though the  
purchaser afterwards declare that he will take  
the money given as the consideration at any  
time, with damages for it, or the like; for if  
it is not a mortgage *in principio*, it shall not  
be so by parol agreement afterwards. (2 Sp.  
622, 623.)

Where land is conveyed on trust, in case a  
sum and interest should not be paid by a day  
named, to sell, and after payment of principal,  
interest, and costs, to pay over the surplus and  
reconvey the unsold part of the estate; and  
the grantee covenants not to sell without  
giving six months' notice; and the grantor  
covenants to pay the debt and interest; but  
there is no proviso for redemption; this is a  
mere mortgage, and the grantor is entitled to  
six months' time to redeem. (*Bell v. Carter*,  
17 Beav. 11.)

Where the transaction is clearly one of  
purchase with a right of repurchase, the time  
limited ought precisely to be observed; and  
there is no principle on which the Court can  
relieve, if it is not so observed. (2 Sp. 623.)

In case the transaction is one of repurchase, and not of redemption, if the purchaser dies seised, and then the right of repurchase is exercised, the money will go to the real representatives, and not to the personal representatives, as it would in the case of a mortgage. (2 Sp. 624.)

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CAP. III.  
SEC. I.

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If a transaction is to be considered in the light of a mortgage as to one party, it must as regards the other. (2 Sp. 623.)

Mutuality.

III. 1. So long as the mortgagor continues in possession, the mortgagee's estate is not absolute, even at Law. For, by stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an ejectment be brought by the mortgagee, provided no suit be pending in any Court of Equity for redemption or foreclosure, the payment of principal, interest and costs shall, except in certain cases, be deemed a satisfaction of the mortgage, and the Court may compel the mortgagee to reconvey the estate. But when the mortgagor has ceased to be in possession, and there has been a default in the payment of the money at the stipulated time, the estate of the mortgagee becomes absolute at Law. Yet his estate is in Equity treated as a mere security for the principal and interest and costs properly in-

III. Mortgagee's estate, rights, and remedies.

1. Mortgagee's estate.

TIT. III.  
CAP. III.  
SEC. I.

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curred in relation to the mortgage, and follows the nature of the debt. And although, where the mortgage is in fee, the legal estate descends to the heir of the mortgagee, yet, in Equity, it is deemed a chattel interest and personal estate, and belongs to the personal representatives as assets. (Coote, Mortg. 3rd ed. 539; 2 Sp. 296.)

2. Mortgagee's rights.

Possession, leases, rent.

2. As to the mortgagee's rights, he is entitled to enter into possession of the lands, and to take the rents and profits, unless there is some agreement to the contrary; and if the security is insufficient, he may fell timber and sell it towards liquidation of his debt; but, with this exception, he may not commit waste. He may grant leases, subject to the equity of redemption, and avoid any leases that have been made by the mortgagor subsequently to his mortgage. He must, however, account for the rents he receives, and pay an occupation-rent, for such part as he may keep in his own possession. (St. § 1016, 1016 b; 2 Sp. 642, 645, 646, 648; Coote, Mortg. 3rd ed. 332, 334, 344.)

Limit to mortgagee's advantage.

A mortgagee is not allowed to obtain any advantage out of the security beyond his principal and interest.

A mortgagee cannot, in the first instance, stipulate that, if the interest be not paid at the time, it shall be converted into principal. (2 Sp. 628.) To convert interest into principal, the interest must first become due, and then there must be an agreement in writing signed, to make it principal, at least so as to affect the estate; and the interest cannot even then be turned into principal to the prejudice of subsequent incumbrances of which the mortgagee has notice at the time of the agreement. (2 Sp. 656.)

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CAP. III.  
SEC. I.

Conversion  
of interest  
into principal.

A stipulation that the mortgagee shall receive interest at £4 per cent. if regularly paid, but £5 per cent. if default be made, is good, if £5 per cent. is reserved by the deed. But if £4 per cent. only is reserved, a stipulation that £5 per cent. shall be paid, if the interest be not regularly paid, is in the nature of a penalty against which the Court will relieve. (2 Sp. 631.)

Increase of  
interest on  
default in  
regular payment.

Leases made by the mortgagor to the mortgagee at a rent are looked upon with great suspicion as likely to have originated in the mortgagee having taken advantage of the necessities of the mortgagor to obtain a lease upon terms upon which the property would

Leases to the  
mortgagee.

TIT. III. not have been let except for those necessities.  
 CAP. III.  
 SEC. I. (2 Sp. 632.)

What the  
 mortgagee  
 may add to  
 his debt.

The mortgagee in possession has a right to add to his debt any sums he may be compelled to pay for arrears of rent, or for maintaining the title to the estate, or for rebuilding the premises, or for necessary repairs, or the expenses of renewing a renewable leasehold, with interest from the time the sums were advanced. But he cannot by contract or otherwise entitle himself to make any charge for management. (2 Sp. 649, 650, 653.)

Allowance  
 for receiver.

The mortgagee is not allowed to make any charge as receiver, if he himself has personally received the rents, even though it may have been agreed that he should be paid for his trouble in receiving them, and though a receiver might have been employed at the expense of the mortgagor. And it is only where the owner himself, in the ordinary course of management, would have had to employ one, that the mortgagee is entitled to employ a bailiff or receiver, unless with the sanction of the mortgagor. (2 Sp. 807.)

Mortgage of  
 West India  
 estate.

A mortgagee of a West India estate may stipulate that the consignments shall be made to him. And, if out of possession, he may take a certain reward for the management of

the estate, provided he do not make that employment a condition. But when he takes possession, he is not at liberty to charge the mortgagor, whom he has ousted, for the trouble he takes on his own account; and he cannot charge or stipulate for commission on consignments, insurance and the like, but stands in the position of the mortgagee in possession of an English estate. (2 Sp. 630.)

TIT. III.  
CAP. III.  
SEC. I.

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As a mortgagee is not allowed any advantage beyond securing his principal and interest: where an advowson is mortgaged, and the living becomes vacant prior to the foreclosure, the mortgagee is compellable in Equity to present the nominee of the mortgagor; even although nothing but the advowson be mortgaged, and the deed contains a covenant that on any avoidance the mortgagee should present. But he may pray a sale of the advowson. (2 Sp. 629.)

Mortgage of  
advowson.

The mortgagee is at liberty to stipulate for the option of pre-emption, in case the mortgagor should determine to sell. (2 Sp. 631.)

Pre-emption.

A mortgagee is not bound to produce his mortgage-deed or indeed any of the deeds in his possession to the mortgagor or any person claiming under him, until payment of

Production  
of deeds by a  
mortgagee.



TIT. III. the principal and interest due and his costs,  
 CAP. III. though the application be made *bonâ fide*,  
 SEC. I. only to obtain information with a view to  
 — paying off the mortgage. (2 Sp. 655.)

Right of  
 mortgagee to  
 devise the  
 property.

As an incident to the right of the mortgagee, he is at liberty to devise the legal estate in the mortgaged property to trustees, if he thinks fit, instead of allowing it to descend to his heir at law; and the mortgagor must bear the costs of obtaining a reconveyance, although they may have been increased by such devise. (2 Sp. 669.)

Mortgagee  
 ejecting or  
 refusing  
 tenant.

If a mortgagee in possession turns out or refuses to accept a responsible tenant, he is liable for any loss occasioned thereby. (2 Sp. 806.)

Tacking.

Both at Law and in Equity, in the absence of particular circumstances, statutes, judgments, and recognizances, all rank according to their dates. (2 Sp. 727.) And so, in Equity, do equitable charges of every kind, where the equities are equal in all other respects than that of priority of time. (2 Sp. 727—732; Coote on Mortg. 410, ed. 3; remarks of V. C. Kindersley, in *Rice v. Rice*, 2 Drewry, 78.) But if a third incumbrancer by mortgage, without notice of a second incumbrance at the time of lending his money,



TIT. III.  
CAP. III.  
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should purchase the first legal mortgage, judgment, statute, or recognizance, even after notice of the second mortgage, so as to acquire the legal title, and should hold both securities in his own right, Equity will tack both incumbrances together in his favor; so that the second mortgagee will not be permitted to redeem the first, without redeeming the third also; on the principle that where the equities are equal, the Law shall prevail. But if a puisne creditor by judgment, statute, or recognizance, should buy in a prior mortgage, he would not be allowed to tack his judgment to such mortgage, so as to cut out or postpone a mesne mortgage; because he did not originally advance his money on the immediate credit of the land, and, by his judgment, he did not acquire any right in the land, but before the Statute 1 & 2 Vict. c. 110, only a lien on the land, which might or might not be enforced on it (see St. § 412—416, 418, 421; 2 Sp. 734, 735, 737, 740; but see 2 Sp. 722, 723); although now, under the 13th section of that Act, except as regards purchasers, mortgagees, or creditors, who became such before the time for the commencement of the Act, a judgment will operate as a charge on real estate.

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If a first mortgagee lends to the mortgagor a further sum on another mortgage, or on a statute or judgment, or even if he lends a further sum on note, and it is distinctly agreed at the time to be on the security of the mortgaged property, he will be entitled to retain till both sums are paid, as against a mesne mortgage, of which he had no notice at the time of the further advance. (St. § 417, and note; 2 Sp. 721, 735, 739.) But a statute or judgment creditor who is the first incumbrancer, cannot, by buying a subsequent mortgage, tack it to his statute or judgment, because he did not advance his money on the immediate credit of the land. (2 Sp. 740.) And a prior mortgagee, having a bond debt, has never been permitted to tack it against any intervening incumbrancer of a superior rank between his bond and mortgage, nor against other specialty creditors, even against the mortgagor himself, but only against his heir, in order to avoid circuitry of action. The reason given is, that the bond debt, except in the hands of the heir, is not a charge on the land. (St. § 418; 2 Sp. 723—725, 735.)

And when a puisne mortgagee has bought in a prior incumbrance, but the legal estate is

vested in a trustee, or the puisne mortgagee has not obtained the legal title, or he takes in *autre droit*, the incumbrances are paid in the order of their priority in point of time, according to the maxim, *Qui prior est tempore, potior est in jure*, and the principle that he who has the better right to call for the legal title, or for its protection, shall prevail. (St. § 419 ; 2 Sp. 745.)

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Where a first mortgagee voluntarily, distinctly, and unjustifiably agrees to allow the mortgagor to retain the title deeds, he will be postponed to a second mortgagee. (St. § 393, and see § 1010 ; 2 Sp. 766, 767 ; *Finch v. Shaw*, 19 Beav. 500.) So if he conceals his mortgage from a person who, as he knows, is about to lend money to the mortgagor, he will be postponed to that person. (St. § 390 ; 2 Sp. 732, 766.) A second incumbrancer upon equitable reversionary interest in stock, who has given notice of his incumbrance to the trustees of the property, whether he has inquired of them as to the state of the title or not, will be preferred to a prior incumbrancer, who has omitted to give notice of his incumbrance to the trustees. But a mortgagee of an equitable estate in land has no occasion to give notice to the

Postpone-  
ment of a  
prior mort-  
gagee.

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trustees, either to complete his title as against his mortgagor, or to secure to himself his priority against subsequent incumbrancers. (2 Sp. 764; *Rooper v. Harrisson*, 2 K. & J. 86.) A declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, will give a subsequent incumbrancer a better equity than a mere declaration of trust taken by a prior incumbrancer. (St. § 421 b, and note; 2 Sp. 729.) But it will not create a prior equity in a subsequent incumbrancer, that he claims by a legal title, while the prior incumbrancer claims by an equitable title. (St. § 421 b, note, 1035 a.) Yet if the first incumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to that deed, and declares himself to be a trustee for the second incumbrancer, the second will have a better equity to call for the legal estate than the first. (2 Sp. 729.)

Mortgagee's  
remedies.

Foreclosure.

3. As to the remedies of the mortgagee to secure the discharge of the mortgage, a bill for a foreclosure is in common cases deemed

the appropriate and exclusive remedy. (St. § 1026.)

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An intermediate mortgagee is entitled to file a bill of foreclosure against the mortgagor and the subsequent mortgagees. (2 Sp. 674.) A person entitled to a part only of the mortgage money cannot file a bill to foreclose a portion of the estate. (2 Sp. 674.) A bill of foreclosure may be filed notwithstanding a decree for redemption; for the mortgagor may make default. (2 Sp. 675.) Where a decree of foreclosure is made against an infant heir or devisee of the mortgagor, the infant has a year and a day to show cause against the decree on his coming of age; but he can only do this by showing error in the decree, or falsifying the accounts for fraud or error. (2 Sp. 680, 681.)

A foreclosure suit cannot be brought but within twenty years after the right to bring such suit first accrued, or within twenty years after the last payment of any part of the principal money or interest. (See Stat. 3 & 4 Will. IV. c. 27, s. 2, and Stat. 7 Will. IV. & 1 Vict. c. 28.)

By the Stat. 15 & 16 Vict. c. 86, s. 48, on Sale. a foreclosure suit being instituted, the Court may now decree a sale. Before that Act,

TIT. III. where there was no power of sale inserted in  
CAP. III. the mortgage-deed, Courts of Equity refused  
SEC. I. — to decree a sale against the will of the mort-  
gagor, except in these cases: (1.) Where  
the estate was insufficient to pay the incum-  
brances. (2.) Where the mortgagor was dead,  
and there was a deficiency of personal assets.  
(3.) Where the mortgage was of a dry rever-  
sion. (4.) Where the mortgagor died, and the  
estate descended to an infant. (5.) Where the  
mortgage was of an advowson. (6.) Where the  
mortgagor became bankrupt, and the mort-  
gagee prayed a sale. (7.) Where the mort-  
gagor was dead, and the mortgagee, by his  
bill brought against the executor or adminis-  
trator and the heir, prayed for a sale of the  
mortgaged estate, alleging it to be a scanty  
security, and for the payment of any defi-  
ciency out of the general estate of the mort-  
gagor. (8.) Where the mortgage or charge  
was purely equitable, as by a deposit of title  
deeds. (9.) Where the land in mortgage was  
subject to a sale by the local Law, as in Ire-  
land. (St. § 1026; 2 Sp. 676—678.) The  
ground of the distinction, as it respects the  
first seven of these cases, would appear to be  
this; that, from the nature of the property, it  
would not be worth while to redeem it, or,

from the circumstances of the mortgagor, he or his representatives are unable to redeem it; so that a bill for a foreclosure would probably have no other effect than to secure the property to the mortgagee; and, in case the value of the property should be less than the amount of the incumbrance, this would not be so advantageous to him as a sale; and in case it should turn out more than sufficient to pay the debts, a sale would be more advantageous to the mortgagor, as he would have the surplus after paying off the incumbrance.

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Though a power of sale be harshly exercised, and at a time when, having a regard to the interests of the mortgagee, he would not have been advised to sell, yet the sale cannot be impeached on that account. (2 Sp. 634, 646.) But where the power of sale is given to a trustee, it is his duty to attend equally to the interests of both parties. (2 Sp. 636.)

A sale may be made without notice to the mortgagor, and without his concurrence, unless that is made a condition. (2 Sp. 635.)

Where the surplus produce on the execution of a power of sale in a mortgage in fee is directed to be paid to the mortgagor, his



TIT. III. executors, &c., this is not of itself a conver-  
 CAP. III. sion of the equity of redemption into personal  
 SEC. I. estate. If the sale take place in the lifetime  
 — of the mortgagor, the surplus is personal es-  
 tate; but if he dies before the sale is made,  
 the equity of redemption descends to the heir,  
 and he is entitled to the surplus. (2 Sp. 636.)

A trustee for sale cannot become the pur-  
 chaser. (2 Sp. 636.)

Where there are several incumbrancers, a  
 decree for sale of an incumbered estate does  
 not alter the relative rights of the parties : the  
 purchase money is substituted for the estate.  
 (2 Sp. 678.)

Concurrent  
 remedies of  
 mortgagee.

The Court will not prevent a mortgagee  
 from using all the remedies belonging to his  
 character of mortgagee, and exercising all  
 the powers that are given to him, as and  
 when he pleases, even concurrently. (2 Sp.  
 634.) A power of sale is only an additional  
 remedy, and therefore does not interfere with  
 the right of the mortgagee to foreclosure. (2  
 Sp. 636.) If a debt is secured by the mort-  
 gage of a real estate, and also by covenant  
 and collaterally by bond, the mortgagee may  
 pursue all his remedies at the same time. If  
 he obtains full payment on the bond or cove-  
 nant, the mortgagor is, by the fact of pay-



ment, entitled to redeem the estate, and foreclosure is prevented or not allowed. But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and, giving credit in account for what he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held that by doing so he gives to the mortgagor a renewed right to redeem, or, in other words, opens the foreclosure: and consequently, upon the commencement of an action against the mortgagor on the bond after foreclosure, he may file a bill for redemption, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again, and the securities given up. After foreclosure, therefore, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure. (2 Sp. 682.)

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IV. Mortga-  
gor's estate  
and rights.

Equity of  
redemption.

IV. We have already seen that as long as the mortgagor continues in possession, he has a right of redemption, even at law, under the stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an action of ejectment is brought against him, and no suit for redemption or foreclosure is pending in a Court of Equity. And until foreclosure, the mortgagor, whether in possession or not, is considered in Equity as substantially the owner of the estate, though his ownership is subject to restrictions for the protection of the mortgagee. Hence, if the mortgagor applies to be allowed to redeem, before the right of redemption is lost by a lapse of twenty years, during which no acknowledgment has been made by the mortgagee of the mortgagor's title or of his right of redemption, the mortgagee will then be treated precisely as a trustee for the mortgagor, inasmuch as he will be compelled to re-convey the estate, and account for every kind of profit that he has made in the ordinary way, or which, but for his wilful default, he might have made. (See St. § 1016, 1013, 1028 a, and 3 & 4 Will. IV. c. 27, s. 28; 2 Sp. 644, 645, 648, 710, 806.)

The common equity of redemption, or ordinary right which the mortgagor has, in

Equity, of redeeming the estate, is so inseparable an incident to a mortgage, that it cannot be disannexed from such a transaction, or controlled even by an express agreement. (St. § 1019; 2 Sp. 618, 619, 628.) And this constitutes an equitable estate in the land, which may be granted, devised, and entailed; and if entailed, might have been barred by a fine or recovery, and may now be barred by a disentailing deed, and is liable to a tenancy by the curtesy, but before the Statute 3 & 4 Will. IV. c. 105, s. 2, was not liable to dower. (St. § 1015; 2 Sp. 642, 645.)

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A mortgagor may, by a subsequent deliberate act, extinguish his equity of redemption. A mortgagee may purchase the equity of redemption of the mortgagor, but the Court views such a transaction with jealousy. (2 Sp. 654.)

The owner of the equity of redemption of part of the estate in mortgage cannot separately redeem his part: the mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together. (2 Sp. 666.) And where a mortgagee has two mortgages on different estates separately mortgaged to him by the same mortgagor,

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and one of them is a deficient security for the debt, and the other is more than sufficient, the mortgagor and his heirs, or the purchaser of one estate, will not be permitted to redeem it without redeeming the other: the mortgagee has a right to insist that all that is due to him shall be paid. An exception occurs where the mortgagee files a bill to foreclose both mortgages, in which case the mortgagor may redeem one, and allow himself to be foreclosed as to the other. (St. § 1023, note; 2 Sp. 651, 666, 726.)

Who may  
redeem.

Even a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainderman, a judgment creditor, a tenant by *elegit* or by statute merchant, the lord of a manor holding by escheat (as regards a mortgage for a term of years, created by a mortgagor who has died without heirs, though not as regards a mortgage in fee, under which the whole estate has passed to the mortgagee, so that there can be no escheat), and indeed every other person having a legal or equitable interest in or lien on the land, may insist on redeeming the mortgage, in order duly to enforce his claim: and when any such person does so redeem, he or she becomes substituted to the

rights and interests of the original mortgagee. But, as a general rule, a *cestui que trust* must redeem through his trustee; and no creditor, or annuitant, or legatee of the mortgagor, who has not a specific security upon the property mortgaged, can file a bill to redeem, though the mortgaged property would, if redeemed, be applied in a course of administration in discharge of his claims. (St. § 1023; 2 Sp. 660—663.)

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A purchaser of an equity of redemption cannot file a bill to redeem an existing mortgage until his purchase is completed. (2 Sp. 668.)

Every person who has a right to redeem the mortgage, may redeem any prior incumbrancer, on payment of principal, interest, and costs due to him; the redeeming party being also liable to be redeemed by those below him, who are all liable to be redeemed by the mortgagor. (2 Sp. 665.)

In settling the accounts between the mort- Annual rests.  
gagor and mortgagee, where the latter has been in possession, sometimes annual rests are made, so that the excess of rent or value beyond the interest may be applied in liquidation of the principal. Rests are not made where the interest of the mortgage is in

TIT. III. arrear at the time when the mortgagee takes  
CAP. III. possession. But where there is a special  
SEC. I. — reason for making annual rests, as where no  
arrears of interest are due at the time when  
the mortgagee enters into possession, or any  
agreement exists between the parties by which  
the interest in arrear is converted into prin-  
cipal; there, and in such cases, annual rests  
will be made. (St. § 1016 a; 2 Sp. 809.)  
Annual rests will equally be directed in re-  
spect of the occupation rent fixed on a mort-  
gagee in possession, as in respect of rents  
received. (2 Sp. 811.)

Possession. The mortgagor is not entitled to the pos-  
session in respect of his equitable estate,  
unless there is some special agreement to  
that effect, but he holds it solely at the will  
of the mortgagee, who may at any time,  
without giving any prior notice, recover the  
same by ejectment against him, unless he is  
ready to pay principal, interest, and costs, or  
against his tenants under a tenancy created  
subsequently to the mortgage; and he is not  
even entitled to reap the crop. But so long  
as he continues in possession by the per-  
mission of the mortgagee, he is entitled to  
take the rents and profits in his own right,  
without rendering any account whatever to

Rents.

the mortgagee, though the mortgaged property may have become an insufficient security. But he will not be permitted to do any thing which may diminish the security of the mortgagee. Yet he may cut down timber when in possession, unless the land alone would be a scanty security. (St. § 1017; 2 Sp. 646, 648.)

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CAP. III.  
SEC. I.

Waste.

A mortgagee in possession is not obliged to lay out money any further than to keep the property in necessary repair; and he has no right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and of protecting the title to the property. Hence, he will not be allowed for general improvements made without the consent or acquiescence of the mortgagor. (St. § 1016 b; 2 Sp. 808.)

Expenditure.

V. Where a mortgage is by assignment of a leasehold interest, the mortgagee, unless there is a special provision to the contrary, as between the mortgagor and the mortgagee, takes the interest subject to the covenants and obligations of the original lease. But if an underlease, instead of an assignment, be taken, the mortgagee will be protected. (2 Sp. 614.)

V. Mortgage  
of leasehold.



TIT. III. A mortgage, whether legal or equitable, of  
 CAP. III. leasehold premises, includes the goodwill of a  
 SEC. I. trade followed on the premises, and the fix-  
 — tures. (2 Sp. 637.)

Mortgage of  
 renewable  
 leasehold.

Neither the mortgagor nor the mortgagee of a renewable leasehold is bound to renew, unless it is a part of his contract to do so. If a renewable leasehold is assigned by way of mortgage, an agreement between the landlord and the mortgagee, without the concurrence of the mortgagor, will not bind the mortgagor. (2 Sp. 650; Coote, Mortg. 3rd ed. 122, 344.)

VI. Rent in-  
 stead of in-  
 terest.

VI. Where the relation of mortgagor and mortgagee subsists, it is hardly possible that an agreement under which the mortgagee is to hold the land, at a rent as an equivalent for interest, can be supported; it being considered, independently of the question as to usury, to be against public policy, that such agreements should be permitted to take place between parties one of whom has an obvious advantage over the other. (2 Sp. 617.)

VII. Mort-  
 gage for  
 costs.

VII. A solicitor may take a mortgage security from his client for costs already due, but not for costs to become due. (2 Sp. 630.)



VIII. Lands are sometimes conveyed by way of mortgage to a third person agreed upon by the mortgagor and mortgagee, or to the mortgagee himself, in trust, upon non-payment of the mortgage money at the appointed time, and usually upon notice, to sell the estate, to satisfy the debt out of the proceeds. In this case, though the mortgagor covenant to join, the purchaser cannot require that he should join in the conveyance. (2 Sp. 634.)

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CAP. III.  
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VIII. Con-  
veyance in  
trust to sell.

IX. Where a person affects to make a mortgage, but the deed is defective, further assurance will be enforced in Equity. (2 Sp. 639.) If a man, after making a defective mortgage to one person, makes a mortgage by an assurance which is effectual to another person, the second shall prevail, if he lent his money on the security of the land and without notice ; because he has equal Equity and the legal title. (2 Sp. 639.) But (except so far at least as the Stat. 1 Vict. c. 110, does not alter the case), a defective mortgage would prevail against a mere subsequent judgment creditor, who is in the nature of a volunteer as regards his lien on the land. (2 Sp. 639, 640.)

IX. Defec-  
tive mort-  
gage.

TIT. III.  
CAP. III.  
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X. Payment  
of debt.

X. A mortgagee, whose money is not paid, on the day appointed by the proviso, is entitled to six months' notice previously to its being paid. If the money is not tendered on the day of the expiration of the notice, the mortgagee is entitled to another six months' notice. If the mortgagee refuse to receive his money after due notice, interest will cease from the time of the tender, provided the mortgagor keep the money continually ready and make no profit by it. The first mortgagee is bound to accept payment of his principal, interest, and costs, when tendered by a second mortgagee, and thereupon to convey to him the estate, whether the tender be made with or without the privity of the mortgagor; and generally speaking he is justified in accepting payment from, and transferring the legal estate to, any person who tenders the principal, interest and costs due to him, that person being interested in the equity of redemption. (2 Sp. 652, 653.)

If the condition be for payment to the mortgagee, his heirs or his executors, the mortgagor, after the death of the mortgagee and before forfeiture, may pay either the heir

or the executor, as he pleases; but after forfeiture, the money is to be paid to the executor; and even if paid to the heir before forfeiture, it belongs to the executor; because the Court of Chancery considers a mortgage debt as part of the mortgagee's personalty; the money came from that source, and is to be returned to it. (See 2 Sp. 650, 651.)

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XI. There is a kind of mortgage called a Welsh Mortgage, which however has now fallen into disuse, in which there is no condition or proviso for repayment at any time. The agreement is that the mortgagee, to whom the estate is conveyed, shall receive the rents till his debt is paid, and in such case the mortgagor and his representatives are at liberty to redeem at any time. (2 Sp. 616.)

XI. Welsh  
Mortgage.

XII. Where a husband is seised *jure uxoris*, and he and his wife join in a mortgage, reserving the equity of redemption to him and his heirs, he has the equity of redemption *jure uxoris* as he before had the legal estate, unless there is some recital of intention that the husband shall take the benefit, or it is evident that the transaction is more than a mere mortgage, or the

XII. Mortgage of wife's estate.

TIT. III. limitation of the estate is perfectly distinct  
 CAP. III. from the equity of redemption. (2 Sp. 644.)  
 SEC. I.

— Where a mortgage is made of the wife's lands, to secure money borrowed by the husband—and in the absence of evidence to the contrary, the loan will be presumed to have been obtained for his purposes—his estate, especially where he covenants to pay the debt, is made to pay the mortgage-money, at the instance of the heir of the wife as well as the wife herself; although the husband may have paid off the mortgage, and taken an assignment in trust for himself, his executors, &c., and though by consequence legacies given by the husband may be defeated: for the wife joining in the security does not make it less the debt of the husband, and her estate is considered as surety only for the debt. (2 Sp. 841, 842.)

XIII. First  
 mortgagee  
 answerable to  
 second.

XIII. After notice of a second mortgage, the first mortgagee is answerable to the second for the rents and profits he has received or might have received. (2 Sp. 648.) And where the mortgagee enters, and then permits the mortgagor to receive the rents, he will be accountable, as mortgagee in possession, to a subsequent incumbrancer, of

whose incumbrance he had notice. (2 Sp. 806.)

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SEC. I.

XIV. The mortgagee, or those claiming under him, cannot dispute the title of the mortgagor. (2 Sp. 654.)

XIV. Title.

XV. An assignment of a mortgage is an assignment of the debt, and it is not necessary that notice should be given to the mortgagor. (2 Sp. 655.)

XV. Assign-  
ment of  
mortgage.

If a mortgagee in possession assigns over his mortgage without the assent of the mortgagor, the mortgagee is still bound to answer for the profits both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer for the profits of the pledge. (2 Sp. 656.)

XVI. The purchaser of a mortgage, as a general rule, has a right to claim, against the mortgagor, and all deriving title under him, the full amount of what is due on the security, whatever he may have given; for as he takes the risk, so he is allowed the gain, if any. But an heir, a trustee, an agent, or an executor, can only claim the amount which he gave for it; unless he has bought in that security to protect one of his own. (2 Sp. 657, 739.)

XVI. What  
purchaser of  
a mortgage  
has a right to  
claim.

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CAP. III.  
SEC. I.

XVII. Gift  
of mortgage  
security.

XVIII. De-  
vise by a  
mortgagee.

XIX. Right  
of purchaser  
of equity of  
redemption.

Right of  
second equit-  
able mort-  
gagee.

XX. Extin-  
guishment of  
the mortgage  
debt by can-  
celling.

XVII. A gift of a mortgage security, is a gift of all the testator's interest in the money and the security. (2 Sp. 655.)

XVIII. Where a testator devises all his real estates, whatsoever and wheresoever, the legal estate in mortgaged premises will pass by the will, unless a different intention is to be collected from the context. But it would seem that a general or even a particular devise of the mortgaged lands will not of itself have the effect of carrying the beneficial interest in the mortgage. (2 Sp. 655.)

XIX. Generally speaking, a purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards the subsequent incumbrancers, as if he had himself been the mortgagor. And where a second equitable mortgagee, who becomes such without notice of the first equitable mortgagee, afterwards, with notice of the first incumbrance, obtains the legal estate from the mortgagor, he holds the legal estate subject to the first incumbrance. (2 Sp. 746.)

XX. If a mortgagee cancels a mortgage, and it is found so in his possession on his death, it is as much a release as cancelling a bond; but it does not convey or revest the

estate in the mortgagor, for that must be done by some deed: the legal estate, in such a case, descends upon the heir; but there being no debt at Law or in Equity, at least upon the mortgage, the Court holds the heir to be a trustee for the mortgagor. (2 Sp. 749.)

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XXI. If the debt is paid off, the mortgage is extinguished in Equity, and the mortgagee is deemed a trustee for the mortgagor. (2 Sp. 640.) And an extinguishment of the mortgage debt will take place where the mortgagee becomes the absolute owner of the equity of redemption; for then the equitable estate merges in the legal; unless it was apparently his intention, or it is manifestly for his interest, to keep the incumbrance alive. (St. § 1035 b.)

XXI. Or by  
payment,

or by merger.

XXII. The mortgagee cannot be compelled to reconvey until the money is in pocket: payment into Court is not sufficient. (2 Sp. 653.)

XXII. Re-  
conveyance.

XXIII. Where a person makes a mortgage in fee, and dies intestate without heirs, the equity of redemption does not escheat to the Crown, but belongs to the mortgagee, subject to the debts of the mortgagor. (*Beale v. Symonds*, 16 Beav. 406.)

XXIII. Death  
of mortgagor,  
intestate,  
and without  
heirs.

TIT. III.  
CAP. III.  
SEC. II.

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## SECTION II.

### *Of Equitable Mortgages of Real Property.*

SEC. II.  

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Besides mortgages created by a formal instrument, and valid at Law as well as in Equity, there are Equitable Mortgages. These are created either by a written instrument, or by a deposit of deeds with or without writing. (2 Sp. 777.) Any written agreement or directions, or other instrument in writing, which shows that it was the intention of a creditor thereby to make his land or other property a security for the debt, will be equivalent in Equity to an actual mortgage by deed or to a pledge. (2 Sp. 777—779.) And a deposit of title-deeds with a creditor, (whether with or without any written memorandum, and even without a word passing,) as security for an antecedent debt, or on a fresh loan of money, constitutes an equitable mortgage. (St. § 1020; 2 Sp. 781.)

The doctrine that such a deposit creates an equitable mortgage appears to arise from the nature of the case. A Court of Law could not assist a debtor who has made such a de-



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posit, to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that, until the money is paid, the party has no right to them. So if the party should come into Equity for relief, he would be told, that, before he sought equity, he must do equity, by repaying the money for which the deeds had been lodged in the other party's hands. (St. § 1020, note.)

The deposit will cover subsequent advances, if it clearly appear that they were made upon the faith of that security, or that the original deposit was continued with an agreement for a further advance. (2 Sp. 781.)

The meaning and object of the deposit may be explained by parol evidence. (2 Sp. 784.) And evidence is admissible to show that a delivery of deeds to a third person, by a person not being the party whose estate is sought to be charged, even though no money passed at the time, constituted an equitable mortgage. (2 Sp. 784.)

An equitable mortgage will not avail against a subsequent mortgagee, whose mortgage has been duly registered, without notice of the deposit of the title deeds. (St. § 1020.)

An equitable incumbrancer on property,

TIT. III. who has distinct notice of a prior incum-  
 CAP. III. brance, cannot, by concealing his knowledge  
 SEC. II. from his assignee, give such assignee a better  
 — right than that which he himself possesses.  
 (*Ford v. White*, 16 Beav. 125.)

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### SECTION III.

#### *Of Mortgages and Pledges of Personal Property.*

##### SEC. III.

I. A mort-  
 gage and a  
 pledge dis-  
 tinguished  
 from each  
 other.

I. A mortgage of personal property is a transfer of the ownership itself, subject to be defeated by the performance of the condition within a certain time. But a pledge only passes the possession, or at most a special property to the pledgee, with a right of retainer till the debt is paid or the engagement is fulfilled. (St. § 1030; 2 Sp. 771.)

II. Tacking.

II. A mortgage or pledge of personal property may be held till a subsequent debt or advance, without notice of a mesne incumbrance, is paid, as well as the original debt (except in case of a bankruptcy), on the ground that it may be presumed that the mortgagee or pledgee would not have lent the further sum except on the credit of the mortgage or

pledge, and that he who seeks equity must do equity. This presumption may indeed be rebutted by circumstances; but unless it is rebutted, it will generally prevail in favor of the lien, against the pledgor himself, although not against his creditors, or against subsequent purchasers of the equity of redemption. (St. § 1034; 2 Sp. 772, 733.)

TIT. III.  
CAP. III.  
SEC. III.

---

III. A mortgagor of personal property may redeem, if he brings his bill within a reasonable time. But, on the other hand, the mortgagee may, on due notice, sell the property, instead of bringing a bill of foreclosure. (St. § 1031; 2 Sp. 637.) The reason would appear to be that on which the Court of Chancery acts in not decreeing a specific performance of agreements respecting personal property; namely, that other things of the same kind, and of the very same worth, even to the party himself, may be purchased for the sum which the articles in question fetch; and therefore if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of filing a bill of foreclosure.

III. Mort-  
gagor's right  
to redeem,  
and mort-  
gagee's right  
to sell.

IV. If a person absolutely transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, be-

TIT. III. comes liable for calls or other payments, he  
 CAP. III. cannot compel his mortgagor to indemnify  
 SEC. III. him, unless he comes to redeem. (2 Sp. 774.)  
 —

V. The mortgagee of a ship is entitled to the accruing freight from the time he takes possession. (2 Sp. 775.) A security valid in Equity, though not at Law, may be given upon freight to be earned or a cargo to be acquired. (2 Sp. 775.)

VI. Pledgor's  
 right of re-  
 demption.

VI. In the case of pledges, if a time for redemption is fixed by the contract, still the pledgor may redeem it afterwards, if he applies to the Court of Chancery within a reasonable time. If no time is specified for the payment, the pledgor may redeem it at any time during his life, unless he is called upon to redeem by the pledgee; and if he fails in so redeeming it, his representatives may redeem it. But this remedy is at Law, unless some special ground is shown; as, if an account or discovery is wanted, or there has been an assignment of the pledge. (St. § 1032; 2 Sp. 637, 772, 773.)

VII.  
 Pledgee's  
 right of sale.

VII. On the other hand, the pledgee may bring a bill in Equity to foreclose, and sell the pledge, but it has been also said, that on due notice given to the pledgor, the pledgee may sell the pledge without any decree of sale

(St. § 1033; 2 Sp. 637, 771): and this would seem to be true, as there would appear to be no ground of distinction between mortgages and pledges of personalty, in that point of view; for the reason above given, as to the propriety of a sale in the case of a mortgage, would seem equally to apply to the case of a pledge.

TIT. III.  
CAP. III.  
SEC. III.

## SECTION IV.

### *Of Liens.*

SEC. IV.

Liens in Equity are wholly independent of the possession of the property.

Equitable  
liens in general.

The usual way of enforcing a lien in Equity, if not discharged, is by a sale of the property to which it is attached. (St. § 1217.)

The lien of a solicitor on the deeds, books, and papers of his client, for his costs, is not like a lien arising in the case of contract: it has not the character of a pledge or a mortgage; but it is merely a right to withhold the deeds, books, and papers which have come into his possession as solicitor, and not a right to enforce his claim against the client. It prevails as against the representatives of the client, but it is only commensurate with

Lien of a  
solicitor for  
costs.

TIT. III. the right of the client, and is subject to the  
 CAP. III. rights of third persons as against him: so  
 SEC. IV. — that a prior incumbrancer cannot be affected  
 by it; and when a mortgage is paid off, the  
 solicitor of the mortgagee cannot retain the  
 deeds. (2 Sp. 800, 801; *Francis v. Francis*,  
 5 D. M. & G. 108.)

But a solicitor has a lien upon a fund realized in a suit, for his costs of the suit or immediately connected with it; and this is a lien which he may actively enforce. (2 Sp. 802.)

Lien of a  
joint tenant;

If one of two joint tenants of a lease renews for the benefit of both, he will have a lien on the moiety of the other joint tenant for a moiety of the fines and expenses. (2 Sp. 803.)

of a trustee;

A trustee is entitled to a lien on the trust estate for his expenses. (2 Sp. 803.)

of annui-  
tants.

Annuitants scheduled to a trust deed do not acquire any lien upon the trust estate, unless they are made parties to the deed. (2 Sp. 804.)

## CHAPTER IV.

## OF APPORTIONMENT AND CONTRIBUTION.

I. IN several cases under these heads, assistance may be had at Law. But even in these cases it may be necessary to resort to Equity, instead of proceeding at Law, in order to avoid a multiplicity of suits; for where there are several parties, as each is only liable to contribute for his own portion, separate actions and verdicts are necessary against each. (St. § 477, 488.)

I. Jurisdiction.

II. An apportionment may be made, either of a benefit, or of an incumbrance, loss, expense, or liability; and in the case of an apportionment of the latter class, a corresponding contribution is enforced, consequent on such an apportionment.

II. Two classes of apportionments.

To mention an instance of an apportionment of a benefit, if an apprentice-fee is given, and the master afterwards becomes bankrupt, Equity will decree an apportionment. (St. § 472, 473.) And where portions are payable to daughters at a certain

Illustrations of the first.

TIT. III.  
CAP. IV.  
—

age, or on marriage, and maintenance is to be allowed, payable half-yearly, at specific times, until the portions are due; if one of the daughters should attain the given age at an intermediate period, the maintenance will be apportioned in Equity. (St. § 479; 2 Sp. 462.)

Illustrations  
of apportion-  
ment of the  
second class.

On the other hand, with regard to an apportionment of, and contribution towards, an incumbrance, loss, expense, or liability, in the absence of an indication to the contrary, where several estates or parts of estates are comprised in one mortgage, and they become vested by devise, descent, or otherwise, in several persons, each estate or part of an estate mortgaged shall, according to its value, contribute proportionally to keep down the interest or to pay off the principal. (St. § 484.) And so it is with different persons having distinct limited interests in an estate which is under mortgage. (St. § 485; 2 Sp. 837.)

III. Volun-  
tary dis-  
charge of an  
incumbrance  
by a tenant  
in tail in pos-  
session;

III. If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished, and the remainderman cannot be called upon for a contribution, unless the tenant in tail keep alive the incumbrance by some suitable assignment, or otherwise manifests his intention to hold



himself out as a creditor of the estate in lieu of the mortgagee; because a tenant in tail in possession can make himself absolute owner of the estate; and therefore, if he discharges incumbrances, he is presumed to do so in the character of owner, unless he clearly shows that he intends to become a creditor in respect of such discharge. But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated; for, if he pays off an incumbrance, it must be presumed that he means to keep it alive. *A fortiori*, the doctrine does not apply to the case of a tenant for life paying off an incumbrance. But, in both cases, the presumption may be rebutted by circumstances which demonstrate a contrary intention. (St. § 486; 2 Sp. 308, 344, 345, 843.)

TIT. III.  
CAP. IV.

by a tenant  
in tail in re-  
mainder;

by a tenant  
for life.

IV. With respect to the compulsory discharge of incumbrances, the modern rule is this: that the tenant for life shall contribute, beyond the interest, in proportion to the benefit he derives from the liquidation of the debts, and the consequent cessation of interest, which of course will much depend on his age, and the computation of the value of his life. If the estate is sold to discharge incumbrances (as the incumbrancer may in-

IV. Compul-  
sory dis-  
charge of in-  
cumbrances.

TIT. III. sist that it shall), the surplus which remains  
CAP. IV. after discharging the incumbrance is to be  
— applied as follows: the income thereof is to  
go to the tenant for life during his life; and  
then the whole capital is to be paid over to  
the remainderman or reversioner. (St. § 487;  
2 Sp. 551, 841.)

V. Keeping  
down the in-  
terest on in-  
cumbrances.

V. A tenant for life is bound to keep down the interest which has accrued during his own time. But if there are any arrears which accrued during the life of a preceding tenant for life, and such arrears cannot be recovered from his estate, they are primarily a charge upon the inheritance. (St. § 488, 1028 a; 2 Sp. 551; *Dixon v. Peacock*, 3 Drewry, 288, 292; *Sparshaw v. Gibbs*, 1 Kay, 333.) A tenant in tail in possession, if of full age, cannot be compelled by the remainderman or reversioner to pay the interest; because he can make himself absolute owner of the estate; and even if the remainderman or reversioner ultimately takes, still, instead of having any just ground of complaint that the interest has not been kept down, he has cause to be grateful to the tenant in tail for not barring the remainder or reversion. If, however, such a tenant in tail does pay the interest, his personal representatives have no

right to be allowed the sum so paid, as a charge on the estate ; because he is supposed to have kept down the interest, as owner, for the benefit of the estate. (St. § 488.)

TIT. III.  
CAP. IV.

If a tenant in tail is an infant, his guardian or trustee will be required to keep down the interest ; because the infant cannot, of his own free will, bar the remainder or reversion. (St. § 488, note.)

VI. Where leaseholds for years or for lives are settled upon several persons in succession, in the absence of any express direction, the rule is, to apportion the charges for the renewal of leaseholds between the tenant for life and the remainderman, in proportion to the enjoyment they have of the renewed lease. (2 Sp. 545, 546.)

VI. Charges  
of renewal of  
leaseholds.

VII. Another case of apportionment and contribution arises in regard to sureties. Originally, it seems to have been questioned whether contribution between sureties, unless founded on some positive contract between them, could be enforced at Law. And although there is now no doubt that it may, yet the legal jurisdiction now assumed in no way affects that which belongs to Equity. (St. § 495, 496.) The contribution thus enforced is not grounded on mutual contract,

VII. Contri-  
bution be-  
tween sure-  
ties.

Jurisdiction.

TIT. III. express or implied, but on principles of  
CAP. IV. natural justice. (St. § 493.)

Where such  
contribution  
is enforced.

If one surety, on the default of the principal, is compelled to pay the whole sum of money, or to perform any other obligation for which all become bound, he can oblige each of his co-sureties, and the representatives of any deceased surety, to contribute, whether the sureties are jointly and severally bound, or only severally, unless there is an express or implied contract to the contrary, and whether their suretiship arises under the same instrument or under different instruments, whether executed with his knowledge or not, if all the instruments are primary concurrent securities for the same debt. (See St. § 492, 495, 497, 498; 2 Sp. 843.) But if the instrument is intended to be only subsidiary to and a security for the other in case of a default in payment, and not to be a primary concurrent security, the surety in the subsequent bond would not be compelled to aid those in the other by any contribution. (St. § 498; 2 Sp. 844.)

What is the  
quantum.

The contribution will generally be equal; but if there is a contract express or implied to the contrary, it will be otherwise. (St. § 498; 2 Sp. 844.) And if there are several

sureties, and one of them is insolvent, and another pays the debt, he can recover from the solvent surety or sureties, as much as such solvent surety or sureties would have had to pay if the insolvent had never undertaken the office of surety. (St. § 496; 2 Sp. 844; *Hitchman v. Stewart*, 3 Drewry, 271.) And when there are several distinct bonds, with different penalties, and a surety on one bond pays the whole, the contribution is in proportion to the penalty of their respective bonds. (St. § 497.)

TIT. III.  
CAP. IV.

VIII. Another instance of apportionment and contribution is that of general average, which is a general contribution that is to be made by all parties in interest towards a loss or expense, which, in the course of a voyage, is voluntarily sustained or incurred for the benefit of all; as where goods are thrown overboard to lighten the ship. (St. § 490.) The contribution is confined to the property saved thereby, including the ship, the freight, and the cargo. It is obvious that this could not be adjusted at Law without a multiplicity of suits. (St. § 490, 491.)

VIII. General average.

## CHAPTER V.

## OF PARTNERSHIP.

I. Jurisdiction.

I. COURTS of Equity exercise a full concurrent jurisdiction with Courts of Law in all matters of partnership ; and indeed, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complication or difficulty. (St. § 683.)

II. Specific performance of an agreement to enter into partnership.

II. In general the Court of Chancery will not enforce a specific performance of a contract to enter into a partnership which may be dissolved instantly at the will of either party, since that would ordinarily be useless. But it will decree a specific execution of an agreement to enter into a partnership for a limited time, and to furnish a share of the

Carrying into effect the articles of partnership, where a partnership has commenced.

capital stock. (St. § 666.) And after a partnership has commenced, the Court will carry into effect the articles of partnership, unless there is an entirely adequate remedy at Law. An exception, however, occurs, where there is an agreement, that, in case of any dispute, the same shall be referred to arbitration ; for Courts of Equity will not enforce such an

agreement, but will leave the parties to their own pleasure. (St. § 667, 670.)

TIT. III.  
CAP. V.

III. A partnership may be dissolved in the ordinary way by death; by the act of the parties; by the bankruptcy of one, or both, or all; or by effluxion of time. (2 Sp. 213.) But Courts of Equity will dissolve the partnership before the regular time, if it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or in case of the insanity, permanent incapacity, or gross misconduct of one of the parties. (St. § 673.)

III. Dissolu-  
tion decreed.

IV. On the other hand, in the case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, Equity will grant an injunction against a dissolution, if a sudden dissolution is about to be made in ill faith, and would work irreparable injury. (St. § 668.)

IV. Dissolu-  
tion pro-  
hibited.

V. An injunction will be granted to prevent a partner from doing acts injurious to the partnership. (St. § 669.)

V. Injury  
prevented.

VI. Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed, to close the business, and make sale of the property. (St. § 672.) But the Court

VI. Account,  
and manager  
or receiver.



TIT. III.  
CAP. V.  
—

of Chancery is not inclined to decree an account, except under special circumstances, if there is no actual or contemplated dissolution, so that all the affairs of the partnership may be wound up. (St. § 671.)

VII. Using  
stock after  
dissolution.

VII. A partner using any portion of the partnership stock, after a dissolution, for any purpose other than for the winding up of the concern, will be treated as a trustee for the others, or their representatives, of the profits he may have made thereby. (2 Sp. 208.)

VIII. Real  
estate.

VIII. Real estate bought and held for the purposes of the partnership, as a part of the stock in trade, will be considered in Equity, although not at Law, as personal estate to all intents and purposes, whatever may be the form of the conveyance; so as to be subject to all the equitable rights and liabilities of the partners and their creditors; and so as to pass to the personal representatives and distributees, on the death of a partner, except, perhaps, where there is a clear expression of the deceased partner that it shall go to his heir-at-law beneficially. (St. § 674; but see 2 Sp. 208—211.)

IX. Rights  
of joint  
creditors.

IX. During the partnership, the joint creditors have no lien, but only a right to sue, and so to obtain possession; and, till that



time, they cannot prevent the partners from effectually transferring the property by a *bonâ fide* alienation. (2 Sp. 212.)

TIT. III.  
CAP. V.  
—

X. The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of either of the partners; although, at Law, this is generally disregarded. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything; although, at Law, a joint creditor may proceed directly against the separate estate. (St. § 675; 2 Sp. 213.)

X. Priority  
as between  
joint and  
separate  
creditors.

XI. The partnership creditors may in the first instance proceed against the executors or administrators of a deceased partner, leaving them to their remedy over against the surviving partner, or *vice versâ*; because every joint debt is joint and several. (St. § 676; 2 Sp. 213.)

XI. Creditors  
may proceed  
against a de-  
ceased part-  
ner's estate  
in the first  
instance.

A similar rule applies to all cases where there is a joint loan to several persons who are not partners. (St. § 676.)

Similar rule  
applies to  
other joint  
debtors.

## CHAPTER VI.

OF CERTAIN SPECIAL ADJUSTMENTS IN CASES  
OF DEBTOR AND CREDITOR.

## SECTION I.

*Of the Marshalling of Securities.*

General  
doctrine.

WE have already had occasion to consider the marshalling of assets in cases of Administration, to which the present topic bears a close analogy. The general doctrine is, that if a creditor has a lien on or interest in two funds belonging to one person, and another creditor has a lien on or interest in one only of the funds, and the claims of both could not be satisfied if the former were to resort to the fund in which alone the latter is interested; there the latter creditor can, in Equity, compel the former to resort to the other fund in the first instance for satisfaction, unless that would operate to the prejudice of the party entitled to the double fund, or the common debtor. (St. § 633, 642; 2 Sp. 834.)

No marshal-  
ling where  
one of two

But although the different securities of one and the same common debtor will be

marshalled so as to satisfy the different creditors, yet where two or more persons are under a joint obligation to one creditor, and one of them is also indebted to another creditor, Equity will not compel the joint creditor to satisfy his claim by proceeding against the joint debtor who is only indebted to such joint creditor, so as to leave the other joint debtor's property for the several creditor; unless it appears that the joint debt ought in fact to be paid by the debtor who is only indebted to the joint creditor, or that there is some other supervening equity. (St. § 642—645.) For, in general it would seem that the several creditor can have no equity to counterbalance the right of the debtor who is only jointly indebted to the joint creditor, to have a contribution from the other joint debtor.

TIT. III.  
CAP. VI.  
SEC. I.

joint debtors  
is also a several debtor  
of another  
creditor.

## SECTION II.

### *Of the Mutual Right to the Benefit of Securities between a Creditor and Sureties.*

Sureties are entitled to the benefit of all securities which have been taken by any of their co-sureties to indemnify themselves against their liability. (St. § 499.)

SEC. II.

TIT. III.  
CAP. VI.  
SEC. II.

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Courts of Equity have also held that on payment by the sureties to the creditor of the debt due by their principal, they are entitled to the full benefit of all securities possessed by the creditor, at least of those possessed by him at the time of such payment, whether of a legal or of an equitable nature, collateral to or other than the original principal security whereby the debt is evidenced, of which the sureties cannot insist on an assignment, because, by the payment of the debt, the title derived under the instrument has become extinct, and therefore an assignment thereof would be useless; and if the surety should afterwards sue for the debt at Law, in the name of the creditor, the principal might plead payment in bar of the action. Thus if at the time when the bond of the principal and surety is given, a mortgage is made by the principal, to be an additional security for the debt; there, if the surety pays the debt, he will be entitled to an assignment of the mortgage, and to stand in the place of the mortgagee; and as the mortgagor cannot get back his estate without a re-conveyance, the assignment and security will remain an effectual security in favor of the surety. But the surety could not obtain

an assignment of the bond itself; nor, for the same reasons, could he insist on an assignment of a judgment, after he had paid off the debt on the judgment. (St. § 499, 499 b, 499 c, 638: see *Newton v. Charlton*, 10 Hare, 646.) And if a surety upon a bond, where there is no other security, pays off the bond debt, he will be treated, in marshalling assets of the principal, as a mere simple-contract creditor of the principal: for the obligation by specialty was incurred, not towards the surety in any event, but only towards the obligee. (St. § 499 d, and note.)

TIT. III.  
CAP. VI.  
SEC. II.

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On the other hand, if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it, and may in Equity reach such security to satisfy his debt. (St. § 502, 638.)

### SECTION III.

#### *Of Set-off.*

SEC. III.

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As to connected accounts of debts and credits, the balance only is recoverable, whether at Law or in Equity. (St. § 1434.)

Connected  
accounts.

But it would seem that Courts of Equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases where,

Independent  
debts or  
demands.

TIT. III. though there are mutual and independent  
CAP. VI. debts, yet there is a mutual credit between  
SEC. III. the parties, founded at the time on the  
— existence of some debt due by the crediting  
party to the other (St. § 1435), or, where peculiar equities intervene. (St. § 1437 a.) And where there are cross demands, of such a nature that if both were recoverable at Law, they would be the subject of a set-off, there, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in Equity. (St. § 1436 a.) But a set-off is ordinarily allowed in Equity in those cases only where the party seeking the benefit of it can show some equitable ground for being protected against the demand of the other party. The mere existence of cross demands will not be sufficient. *A fortiori*, a Court of Equity will not interfere, on the ground of an equitable set-off, to prevent a party from recovering a sum awarded to him for damages for a breach of contract, merely because there is an unsettled account between him and the other party in respect to dealings arising out of the same contract, where it cannot be assumed that the balance will be found to be in favor of the latter. (St. § 1436 and note.)

Equity, following the Law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; unless there was a joint credit given on account of the separate debt, or there are other special circumstances to justify such an interposition. (St. § 1437.)

TIT. III.  
CAP. VI.  
SEC. III.

Where one  
debt is joint,  
and the other  
separate.

Except under special circumstances, Courts of Equity have never allowed cross demands existing in different rights to be set the one against the other. And therefore an executor and the trustee of a legacy, who was also the residuary legatee, and had become a creditor of a person who was the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set-off his debt against the legacy to which the husband, as such administrator, was entitled. (*Freeman v. Lomas*, 9 Hare, 109.) And where a creditor of an intestate purchases part of the intestate's goods from his administrator, the creditor cannot set-off the sum at which he purchased the goods against a debt due to him from the intestate at the time of his decease. (*Lambarde v. Older*, 17 Beav. 542.)

Demands in  
different  
rights.

## CHAPTER VII.

OF CERTAIN MISCELLANEOUS CASES OF  
ACCOUNT.

## I. Agency.

I. IF an agent does not keep regular accounts and vouchers, where it is his duty to do so, he will not be allowed the compensation which would otherwise belong to his agency. And if he mixes up his principal's property with his own, he is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated, both at Law and in Equity, as the property of the principal. (St. § 468.)

## II. Mesne profits.

II. In the ordinary case of mesne profits, where aid was clearly afforded at Law, Courts of Equity will not interpose. (St. § 511.) Wherever relief is given in Equity, it will be found that there is some peculiar equitable ground for interference; such as fraud, accident, or mistake, the want of a discovery, some impediment at Law, the existence of a constructive trust, or the neces-



sity of interposing to prevent multiplicity of suits. (St. § 509—514.)

TIT. III.  
CAP. VII.

III. In cases of legal waste, relief is ordinarily at Law. Yet, according to some cases, if a discovery is wanted, that alone, if it is obtained and is of importance, will carry the ulterior jurisdiction to account, in order to prevent a multiplicity of suits. But other decisions, and those which are relied on as constituting the established doctrine of the Court, seem to require, in order to maintain the jurisdiction for an account, that there should be a prayer for an injunction to prevent future waste. (St. § 515—518.)

III. Waste.

If the waste is equitable only, of course a remedy lies in Equity. (St. § 515, note.)

IV. Matters of account also arise in regard to tithes and moduses. Wherever the right to tithe is clearly established, an account is consequent. But if the right is disputed, it must first be established at Law before an account will be decreed. (St. § 519.)

IV. Tithes  
and moduses.

## CHAPTER VIII.

## OF DAMAGES AND COMPENSATION.

I. General rule as to damages or compensation to a plaintiff.

I. IT would seem that damages or compensation ought to be decreed in favor of a plaintiff in Equity, only as incident to other relief, sought by the bill, and actually granted, or where there was no adequate remedy at Law, or where some peculiar equities intervene. (St. § 794, 798, 799.)

How assessed.

In cases of a complicated nature, damages or compensation are sometimes assessed by directing an issue *quantum daminificatus* to be tried by a jury. (St. § 795.)

II. Compensation to a defendant.

II. Compensation is often given to a defendant, on the principle that he who seeks equity must do equity. Thus, if a plaintiff in Equity seeks the aid of the Court to enforce his title to land against an innocent person, who has made improvements on it, supposing himself to be the absolute owner thereof, that aid will be given only on the terms that the plaintiff shall make a com-

TIT. III.  
 CAP. VIII.

pension to such innocent person, proportionate to the benefit which will be received from those improvements. (St. § 799 a.)

III. Jurisdiction to relieve against penalties and forfeitures.

III. With regard to penalties and forfeitures for breach of conditions and covenants, there was originally no relief but in Equity; and although, by several Statutes, relief may now be had at Law in a great variety of cases, yet the original jurisdiction in Equity still remains. (St. § 1301.)

Where such relief is afforded.

Wherever a penalty or forfeiture appears to have been inserted merely to secure the performance of some act, or the enjoyment of some right or benefit, Equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial object of the party interested therein; and if a compensation can be made for the non-performance or want of enjoyment thereof, it will relieve against the penalty or forfeiture, by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained. (See St. § 1314, 1320.)

Amount of compensation in such cases.

If a compensation can be made, and the penalty is to secure the mere payment of a sum of money, the party will be relieved on paying the principal and interest. If it is to secure the performance of some other act,

TIT. III. the Court will retain the bill, and direct an  
 CAP. VIII.  
 — issue, *Quantum damnificatus*, and when the amount of damages is ascertained by a jury on the trial of such issue, relief will be granted on the payment of such damages. (St. § 1314.)

Such relief is  
 justly  
 granted.

Although it may be urged that in such cases as these, it was the folly of the party to make such a stipulation, yet the folly of one man cannot authorize the other to commit an act of gross oppression, or oblige the former to suffer a loss wholly disproportionate to the injury received. (St. § 1316.) And although, in some cases, from peculiar circumstances, which cannot be taken into account, the compensation awarded may not amount to an adequate compensation, yet that is no solid objection against the interference of Courts of Equity: for, a great injury is always prevented by such interference; whereas the mischief caused thereby is only occasional; and all general rules must work occasional mischiefs. (St. § 1316, note.)

IV. No relief against liquidated damages, where they are really such.

IV. But Courts of Equity will not relieve in cases of liquidated damages, which occur where the parties have agreed, that in case one party shall do or omit a certain act, the

other party shall receive a certain sum, as the just amount of the damage sustained by such act or omission, and where the sum so agreed to be paid is not grossly disproportionate to the nature or extent of the injury. If the sum is so disproportionate, and it is in reality penal, although it may assume the disguise of liquidated damages, the Court of Chancery will treat it as a penalty, and relieve against it accordingly. (St. § 1318.)

TIT. III.  
CAP. VIII.

V. In the case of a breach of a covenant to pay rent, Equity will relieve even where the term is gone at Law by reason of an entry by the landlord by virtue of a clause of re-entry; for that is deemed to be a mere security for the payment of the rent. (St. § 1315, and note to 1323.) But no relief will be granted in Equity in case of forfeiture for the breach of any covenant other than a covenant to pay rent, unless on the ground of accident, mistake, or fraud: for it has been considered that even where the damages are capable of being ascertained by a jury, the jurisdiction of Equity in giving relief is a dangerous jurisdiction, and rarely works a real compensation. (St. § 1320—1326; *Gregory v. Wilson*, 9 Hare, 689. The marginal

V. Where relief is granted as to a breach of covenant.

TIT. III. note as to "accidental" neglect, appears to  
CAP. VIII. be wrong.)

VI. Relief  
not granted  
against sta-  
tutory penal-  
ties or for-  
feitures.

VI. And Equity will not mitigate any penalty or forfeiture imposed by Statute; for that would be in contravention of the direct expression of the legislative will. (St. § 1326.)

VII. A pe-  
nalty or for-  
feiture never  
enforced.

VII. On the other hand, it is an uniform rule in Equity never to enforce either a penalty or forfeiture. Therefore Courts of Equity will never aid in the divesting of an estate, for a breach of a covenant, on a condition subsequent. (St. § 1319.)

## CHAPTER IX.

## OF ELECTION.

ELECTION is the choosing between two rights Definition.  
by a person who derives one of them under  
an instrument in which a clear intention ap-  
pears that he should not enjoy both.

The instances in which Courts of Law Where elec-  
tion arises  
at law.  
have put a party to his election, are cases of  
title, which, by reason of their inconsistency,  
are technically incapable of simultaneous as-  
sertion; as in the case of a contemporaneous  
estate for life and in tail in the same land, or  
a claim of a tenant under and against his  
landlord; or a claim to dower both in the  
land taken and the land given in exchange.  
In Courts of Law, the suitor is permitted to  
assert rights which are confessedly repugnant,  
so far as the intention of the party constitutes  
repugnancy. Thus, if a man makes a feoff-  
ment in fee of lands or tenements, either  
before or after marriage, to the use of the  
husband for life, and afterwards to the use of

TIT. III.  
CAP. IX.

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*A.* for life, and then to the use of the wife for life, in satisfaction of her dower: this is no jointure within the Statute; and although *A.* should die before the husband, and the wife should enter after the death of the husband, yet this would not bar her dower, but she would have her dower also. And the series of decisions under that part of the Statute of Uses which relates to jointures (the only instance in which the doctrine has been applied at Law in a manner analogous to its application in Equity) are expressly founded on the provisions of the Statute, in contrast to the rules of the Common Law. (St. § 1080, note.)

Where election arises in equity.

The doctrine of Election arises in Equity, in cases where a grantor, or, more commonly, a testator, gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest. In such cases the owner of such property, or the person entitled to such interest, cannot both take the gift and retain his own property or interest; but if he takes the gift, he must resign his own property or interest. On the



other hand, if he should elect to hold his own property or interest, or, as the phrase is, if he should elect against the instrument, he cannot have the gift; or at least he cannot have the entire gift without compensating the party whom he has disappointed by electing to take his own property. In such case, Equity, in not suffering the disposition by which such gift is made to enure to the benefit of the person so electing against the instrument, will not render that disposition inoperative, but will make it the means of effectuating that intention of the author of the instrument which such person has frustrated by so electing to retain his own property or interest: for Equity will treat such gift, or at least a part of it, as a trust in the donee or devisee, the person so electing, for the benefit of the party disappointed by such person's refusing to give up his own property or interest. (See St. § 1077, note, and 1081—1084, 1086, 1088, 1089, 1093; 2 Sp. 586, 587, 588, 601—604; *Swan v. Holmes*, 19 Beav. 471.) Indeed the doctrine of election can never be applied where an election is made contrary to the instrument, unless the interest that would pass by it is of that freely disposable nature that it can be laid hold of

TIT. III.  
CAP. IX.  
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TIT. III.  
CAP. IX.

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to compensate the party who suffers by the exercise of such election against the instrument. Thus, where there is a fund subject to the appointment of a father amongst his children, and the father appoints a part to some of his children, and the other part to persons not objects of the power; any child who is an appointee may both take his appointed share and also claim his share of the improperly appointed portion, as in default of appointment. But if there is a power to appoint to two, and the donee of the power appoints to one only and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment. (2 Sp. 590.)

The doctrine of election applies even where, in a will not within the Wills Act, 1 Vict. c. 26, a devise of an estate is made to the testator's heir, and the heir, according to the old rule, takes such estate by descent, and not by purchase, and, by the same will, the testator devises to another person an estate belonging to the heir, over which the testator had no disposing power. (St. § 1094; 2 Sp. 589; *Schroder v. Schroder*, 1 Kay, 578.) And the doctrine is equally applied to all interests, whether immediate or remote, vested or con-

tingent, of value or of no value, and whether in real or personal estate. (St. § 1096; 2 Sp. 588.)

TIT. III.  
CAP. IX.  
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*Primâ facie*, it is not to be supposed, nor must it be proved by extrinsic evidence, that a testator disposes of that which is not his own, so as to raise a case of election. It must appear on the will itself, by plain demonstration or by necessary implication. (2 Sp. 592, 593, 595.)

The same doctrine of election also arises in cases where it was apparently a testator's intention to dispose of all the property he might have at the time of his death, and the heir, who is a devisee under the will, claims property which was purchased subsequently to the will, and which, consequently, under the old law, did not pass by the will, but was intended to pass to another person under the general words of the will. (St. § 1094; *Schroder v. Schroder*, 1 Kay, 578.)

According to the preponderance of authority and principle, a person electing against a will does not forfeit the whole of the benefit intended for him, where the value of the gift exceeds that of his own property or interest; but he is only obliged to compensate in value the claimant whom he has disappointed by

TIT. III.  
CAP. IX.

his refusing to give up his own property or interest. (St. § 1085; 2 Sp. 601—604.) For a Court of Equity interfering to control his legal rights, for the purpose of executing the intention of the testator, is justified in its interference so far only as that purpose requires. (St. § 1085, note.)

Election as to  
one benefit.

A person may decline one benefit given him by a will, such as a legacy charged with a portion, without being precluded from taking another benefit by the same will; unless it is fairly inferable, from the nature of the different benefits, that the party should either take all or reject all. (St. § 1081; see 2 Sp. 591.)

Election  
need not be  
made in ig-  
norance of  
circum-  
stances.

The party is not bound to make an election till all the circumstances are known. And if he should make a choice in ignorance of the real state of funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. And he is entitled, in order to make an election, to maintain a bill in Equity for a discovery, and to have all the accounts taken to ascertain the real state of the fund. (St. § 1098; 2 Sp. 598.)

Election  
presumed.

An election may be presumed from a long acquiescence or from other circumstances.

(St. § 1097; 2 Sp. 598—600; *Worthington* TIT. III.  
CAP. IX.  
v. *Wiginton*, 20 Beav. 67.)

The doctrine of election is not applied in the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ*. (St. § 1092; 2 Sp. 592.)

Where the party bound to elect labours under any disability, as infancy or coverture, the Court will consider whether it will be most beneficial for the party to take under or against the will or deed, and will decree accordingly. (2 Sp. 587.)

No election  
in the case of  
creditors.

Disability of  
party.

## CHAPTER X.

## OF SATISFACTION.

Definition. SATISFACTION may be defined to be, the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor. (See St. § 1099—1101, 1106, and *infra*.)

Where satisfaction arises.

Equitable questions of satisfaction usually arise in three classes of cases :

I. In cases of portions secured by a marriage settlement.

II. In cases of portions given by a will, and an advancement of the donee afterwards in the testator's lifetime.

III. In cases of legacies to creditors. (St. § 1109.)

Satisfaction resting on presumption may be rebutted.

It is advisable to observe in this place, with reference to all these classes of cases, that where the satisfaction is a matter of presumption, that presumption may be rebutted either by intrinsic evidence derived from the will itself, or from extrinsic evidence, as by decla-

rations of the testator or written papers. (St. TIT. III.  
CAP. X. § 1102; 2 Sp. 441—455.)

I. Where a portion or provision is secured to a child by a marriage settlement or otherwise, and the parent or person standing *in loco parentis*—that is, a person meaning to stand in the place of a parent as regards providing for a relation's child—afterwards by will gives the same child a legacy, whether particular or residuary, without expressly declaring it to be in satisfaction of such portion or provision, in such case, if the legacy is substantially the same in its value, in its nature, in time of payment, in certainty, and in benefit, with the portion or provision, and if it is not given for a different purpose, it will, in the absence of evidence to the contrary, be deemed a full satisfaction, as Courts of Equity now incline against double portions. I. As to portions secured by settlement. If the legacy is less in amount than the portion or provision, or if it is payable at a different period, then (looking to the weight of authority) it may be deemed a satisfaction *pro tanto*, or in full, according to the circumstances. (St. § 1109, 1110, 1103, 1104; 2 Sp. 427—430, 432, 433, 438—440; *Lady E. Thynne v. Earl of Glengall*, 2 Ho. of Lords, 153.)

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CAP. X.

II. As to portions left by will to a child.

II. Where a parent or other person standing *in loco parentis* bequeaths to his own or such relation's child a legacy (not being a residuary legacy, which is always changing in amount), and afterwards, by an act *inter vivos*, makes a provision for the same child, of equal or greater amount, of equal certainty, and substantially the same in kind and in degree of benefit, without expressing it to be in lieu of the legacy, or for other objects than those for which the legacy was given,—in such case, in the absence of evidence to the contrary, it will be deemed a satisfaction or ademption of the legacy. And if the provision *inter vivos* is not much less than the legacy, it will be deemed an ademption *pro tanto*. (St. § 1111 and note, and 1112, 1113, 1115, 1103—1105; 2 Sp. 429, 432—435, 438—440.)

No ademption of legacies to strangers.

But this doctrine of the constructive ademption of legacies has never been applied to legacies to mere strangers, unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator, by an act *inter vivos*, exactly for the same purpose, and for none other. (St. § 1117, 1118, 1100, note; 2 Sp. 430.) Indeed,



in the case of strangers, the *onus probandi* is upon those who contend that the two provisions are to be considered but as one: whereas in the case of children, the *onus probandi* is on those who contend for the double provision. (2 Sp. 430.) The term "strangers" here includes all who are not legitimate children of the donor, or children to whom he has placed himself *in loco parentis*. (St. § 1116; 2 Sp. 429.)

TIT. III.  
CAP. X.  
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The ground of the distinction would seem to be, that a legacy by a parent, or by a person *in loco parentis*, is presumed to be intended as a portion, and that it may be fairly regarded as the utmost amount that the testator, from a sense of duty, or from parental or *quasi* parental affection, considered himself able and called upon to spare for the legatee, consistently with the accomplishment of other necessary purposes; and that if he afterwards advances the same amount to the same child, it is almost certain, or, at all events, most likely, that he did so in accomplishment of the same intention of providing for such child to the same extent; especially where the necessity of making a provision has arisen in his lifetime, as when the provision is made on the marriage of the child.

Ground of  
the distinction.

TIT. III. But in the case of a legacy to a stranger, the  
 CAP. X. legacy is a mere arbitrary gift, unconnected  
 — with considerations of duty, or parental or  
*quasi* parental affection; and there is as much  
 reason, in such cases, why the testator should  
 choose to make an additional gift, as there  
 was for his making the original gift by his  
 will.

III. As to le-  
 gacies to cre-  
 ditors.

III. A legacy given to a creditor, if it is  
 of equal amount to the debt, and in other  
 respects equally beneficial, will, in general,  
 in the absence of all countervailing circum-  
 stances, be deemed to be a satisfaction of the  
 debt, on the principle that a testator shall be  
 presumed to be just before he is generous.  
 (St. § 1119, 1120; 2 Sp. 605—607.) But  
 the rule is not allowed to prevail where the  
 legacy is of less amount than the debt, even  
 as a satisfaction *pro tanto*; nor where there  
 is a difference in the time of payment of the  
 debt and of the legacy; nor where they are  
 of a different nature, as to the subject-matter,  
 or as to the interest therein; nor where a par-  
 ticular motive is assigned for the gift; nor  
 where the debt is contracted subsequently to  
 the will; nor where the legacy is contingent  
 or uncertain; nor where there is an express  
 direction in the will for the payment of debts;

nor where the bequest is of a residue ; nor where the debt 'is a negotiable security ; nor where the debt is on an open and running account, so that the testator might not know whether he owed anything. And as to a debt strictly so called, there is no difference whether it is a debt due to a stranger or to a wife or a child. (St. § 1103, 1122 ; 2 Sp. 605—608 ; *Jefferies v. Michell*, 20 Beav. 15.)

TIT. III.  
CAP. X.  
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IV. On the other hand, where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, Courts of Equity will not deem the legacy as either necessarily or *primâ facie* manifesting an intention to release or extinguish the debt ; but they will require some evidence, either on the face of the will, or *aliunde*, to establish such an intention. (St. § 1123.) For, if the legacy is less than the debt, it would clearly be a positive injury to the creditor to construe the legacy a release of the debt ; and even if the legacy is more than the debt, it does not follow that because the testator has manifested his bounty towards the debtor in that respect, he intends the debtor to have another benefit which has no necessary connexion with the former. Where the testator does

IV. As to  
legacies to  
debtors.

TIT. III. not mention the debt, but gives the debtor a  
 CAP. X. legacy of equal or greater amount, he thereby  
 — benefits the debtor to at least the same extent, by giving him the means of paying the debt, as if he had directly forgiven the debt, but had given the debtor nothing, or nothing but the overplus; and his reason for thus giving the debtor the means of paying the debt, without alluding to the debt, may have been one of kind consideration towards the debtor, namely, in order that none but the executor might be aware of the debt.

V. Annuity. V. Where an annuity to the separate use of a married woman is charged on an estate, the gift of an annuity to her generally, and charged upon property of a different nature, though to the same amount and payable on the same days, is not a satisfaction. (2 Sp. 609.) And where a party executes a deed by which he gives annuities to certain persons, and then executes another deed by which he gives other annuities to those persons, there is no presumption that the latter were intended to be a substitute for the former, especially where they vary. (*Palmer v. Newell*, 20 Beav. 32.) So where there is a covenant on marriage to settle specific lands, generally it will not be satisfied by suffering other lands of equal value to descend. (*Ib.* 610.)

Covenant to  
 settle lands.

## CHAPTER XI.

OF PARTITION OF SETTLEMENT OF BOUNDARIES; AND OF ASSIGNMENT OF DOWER.

## SECTION I.

*Of Partition.*

THE non-existence of any remedy at Com- Jurisdiction.  
mon Law, in the case of joint-tenants and tenants in common, until the reign of Hen. VIII.; and the inadequacy of the remedy afforded by the writ of partition, which subsequently to that period, and until its abolition by the Statute 3 & 4 Will. IV. c. 27, s. 36, was available in the case of joint-tenants and tenants in common, as well as of parceners; and the inability of Courts of Law to compel a discovery or to make the requisite compensatory adjustments, together with other circumstances, gave to Equity a general concurrent jurisdiction in cases of partition; so that it was not necessary to state in the bill any peculiar ground of equitable interference. (St. § 647, 658.) And now, in consequence

TIT. III. of the abolition of the writ of partition,  
 CAP. XI.  
 SEC. I. Equity has an exclusive jurisdiction in these cases.

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Mode of partition.

The mode in which relief is administered in Equity, is by first ascertaining the rights of the several parties interested, and then issuing a commission to make the partition; and on the return of the commission and confirmation of the return by the Court, the partition is finally completed by mutual conveyances of the lots made to the several parties. (St. § 650.) If the conveyances cannot be executed on account of infancy, or on account of an executory interest, the decree can only put the parties in possession, and secure them in the enjoyment of the parts allotted to them, until effectual conveyances can be made. (St. § 652.)

Title must be shown.

As a partition is completed in this way by mutual conveyances, it is essential to show a title; and if there is any thing suspicious in the plaintiff's title, the Court will leave him to Law, unless it is a case of equitable title. (St. § 653.)

Partition by or against tenants who have limited interests.

The Court will decree a partition even in a suit by or against persons who are only tenants for life or years; and the decree will be binding on all whom they virtually repre-

sent, but not on other persons. Thus, a decree in a suit by or against a tenant for life, will be binding on the remainderman who is not *in esse* at the time, on the ground of virtual representation, if the Court is of opinion that it will be for the benefit of such remainderman that the agreement should be carried into effect, either as it stands, or with such variations as the Court may think proper. (St. § 656, 656 a.)

TIT. III.  
CAP. XI.  
SEC. I.

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The Court will frequently decree a pecuniary compensation to one, in order to make up his share to its proper value, where the estate cannot conveniently be divided into equal parts. (St. § 654.) And instead of dividing each of several distinct estates, the whole of one estate is frequently allotted to one person, and the whole of another estate to another person, and a compensation is directed to be made to the person to whom the less valuable estate is allotted. (St. § 557.) So, to one who has made improvements on the estate, the property on which the improvements have been made will be assigned, or a compensation will be given him. And care will be taken to assign to the parties such portions of the estate as will best accommodate them; and the Court will act according

Equitable  
adjustments.



TIT. III.  
CAP. XI.  
SEC. I.

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to its own notions of general justice and equity between the parties, and will, if necessary for that purpose, direct a distinct partition of each of several portions of the estate in which derivative alienees have distinct interests, in order to protect those interests; or it will give other special directions to the commissioners, and nominate the commissioners instead of allowing them to be nominated by the parties. (St. § 655, 656 b, c.)

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## SECTION II.

SEC. II.

### *Of the Settlement of Boundaries.*

General rule.

The general rule now observed by the Court of Chancery is, not to exercise jurisdiction in settling boundaries on the mere ground that they are a subject of controversy, but to require that there should be some superadded equity. (St. § 615—623.)

Confusion  
through  
fraud.

Thus, if the confusion of boundaries has been occasioned by fraud, that will constitute a sufficient ground for the interference of the Court. And if the fraud is established, the Court will by commission ascertain the boundaries, if practicable; and if that is not practicable, it will do justice between the parties by assigning reasonable boundaries



or setting out lands of equal value. (St. TIT. III.  
CAP. XI.  
SEC. II. § 619, 623.)

In the next place, there will be a sufficient ground for the jurisdiction, if the confusion has arisen by the negligence or misconduct of a person standing in such a relation to the opposite party as imposed upon him an obligation to preserve and protect the boundaries. Thus, a tenant or a copyholder is under an implied obligation to preserve them; and if, through his default, there arises a confusion of boundaries, the Court will interfere as against such tenant or copyholder to ascertain and fix them. But even in these cases, it is indispensable to aver, and to establish by proofs, that the boundaries cannot be found without being ascertained under the order of the Court. (St. § 620.)

A bill will also lie when it will prevent multiplicity of suits. (St. § 621.)

Confusion through fault of a party whose duty it was to preserve the boundaries.

Multiplicity of suits.

TIT. III.  
CAP. XI.  
SEC. III.

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## SECTION III.

*Of the Assignment of Dower.*

Courts of Equity will now exercise a concurrent jurisdiction with Courts of Law in the assignment of dower in all cases, after the title of the widow, if disputed, has been established by an issue at Law or otherwise. (St. § 624, 626.) There is no difficulty in maintaining this jurisdiction, as a case can scarcely be supposed in which the widow may not either want a discovery of the title deeds, or of dowable lands, or some other kind of discovery, or some assistance which it is or was the peculiar province of the Court of Chancery to afford. (St. § 625—631.)

## TITLE IV.



Of Protective Equity,  
Irrespective of Disability.

## CHAPTER I.

OF PROTECTION FROM LITIGATION OR INJURY,  
AFFORDED BY THE CANCELLING, DELIVER-  
ING UP, AND SECURING OF DOCUMENTS.

1. Voidable  
and void in-  
struments,  
and those  
which have  
answered  
their pur-  
pose.

THE Court of Chancery frequently cancels, or rescinds, or orders the delivery up of, instruments which have answered the end for which they were created, or of instruments which are voidable, or of instruments which are in reality void and yet apparently valid. This is done upon the principle, as it is technically called, *quia timet*, that is, for fear that such instruments may be vexatiously or injuriously used, when the evidence to impeach them may be lost or diminished, or for fear that they may throw a cloud or suspicion over the plaintiff's title and interests. (St. § 694, 698, 699, 700, 705.)

But where the illegality of the instrument appears on the face of it, so that its nullity can admit of no doubt, Equity will not interfere; because, in that case, the ground for interference does not exist. (St. § 700 a.)

Courts of Equity will generally cancel or rescind instruments, or order them to be delivered up, where there is an actual or constructive fraud, and the plaintiff has not participated therein, or is not *in pari delicto*, or where there is a fraud against public policy, and the plaintiff has participated therein, and is *in pari delicto*, but yet public policy would be more promoted by assisting the plaintiff, than by refusing to assist him. (St. § 298, 695.)

TIT. IV.  
CAP. I.

Where an instrument is voidable on account of fraud, as in the case of usurious contracts and gaming securities.

Where both parties are concerned in an illegal act, it does not always follow that they stand *in pari delicto*; for one party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence. (St. § 300.)

In cases of usury, if the lender comes into a Court of Equity, seeking to enforce the contract, the Court will refuse to give any assistance, and will repudiate the contract. But, on the other hand, if the borrower comes into a Court of Equity, seeking relief against the contract, the Court will interfere, although only on the terms that the plaintiff will do equity, by paying the defendant what

TIT. IV.  
CAP. I.

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is really due to him, deducting the usurious interest. (St. § 301.) And if the borrower has paid the money, Courts of Equity, and indeed Courts of Law also, will assist him to recover back the excess beyond principal and lawful interest ; for the maxim, *volenti non fit injuria*, does not apply to the borrower, since he cannot be said to have voluntarily paid the usurious interest ; and as to being a participator in the offence, he was compelled to submit to the terms which oppression and his necessities imposed on him. (St. § 302.)

But relief is not granted where both parties are truly *in pari delicto* ; for the maxim is, that *in pari delicto, potior est conditio defendentis et possidentis*. (St. § 298, 299.) An exception occurs, however, as already stated, where public policy would thereby be promoted ; as in the case of a gaming security, which is void, and money paid on it may be recovered back. (St. § 303, 304.)

Forged instruments.

Forged instruments may be decreed to be delivered up, without any prior trial at law on the point of forgery. (St. § 701.)

Delivery up of unexceptionable instruments to the party entitled to them.

Assistance will often be given even in regard to unexceptionable instruments. The Court of Chancery will order them to be delivered up to the party entitled to them,

if his title to the property to which they relate is not disputed. But where the title to the possession of deeds and other writings depends on the validity of the title of the party to the property to which they relate, and he is not in possession of the property, and the evidence of his title to it is in his own power, or it does not depend on the production of the deeds or writings of which he prays the delivery; in such case, he must first establish his title to the property at Law, before he can come into a Court of Equity for a delivery of the deeds. (St. § 703.)

TIT. IV.  
CAP. I.  
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Again, persons having rights and interests in real estate are entitled to come into Chancery for the purpose of having an inspection and copies of the deeds under which they claim title. (St. § 704.)

Inspection  
and copies of  
deeds.

And remaindermen and reversioners, and other persons having limited or ulterior interests in real estate, have a right, in many cases, to have the title-deeds secured or brought into Chancery for preservation. But this will not be directed, unless it clearly appears that there is danger of a loss or destruction of the instruments in the hands of the persons possessing them; and also that the interest of the plaintiff is not too con-

Securing of  
documents.

TIT. IV. tingent or too remote to warrant the proceed-  
CAP. I. ing. (St. § 704.)  
—

Delivery up  
of securities.

Bonds and notes given by a relation have been ordered to be delivered up by executors or administrators, where it has been fairly inferable, from the conduct of the deceased, that he did not intend that any use should be made of the securities. (See St. § 705 a—706 a.)



## CHAPTER II.

OF PROTECTION FROM LITIGATION RESPECT-  
ING THE PROPERTY OF ANOTHER, BY MEANS  
OF INTERPLEADER.

THERE was a process of interpleader at Com-<sup>Common-law</sup>mon Law, but it had a very narrow range of<sup>process.</sup> application (St. § 801); and prior to the Statute 1 & 2 Will. IV. c. 58, it fell into entire disuse (St. § 805); and although the application of the legal remedy of interpleader has been greatly extended, yet the jurisdiction in Equity seems to have been left substantially on the old foundation. (St. § 823.)

A bill of interpleader is one which is filed<sup>Definition of</sup> by a person from whom two or more other<sup>a bill of in-</sup>persons, whose titles are connected by reason<sup>terpleader.</sup> of the one being derived from the other, or of both being derived from a common source, and whose rights he cannot readily determine, have claimed the same thing, wherein he himself claims no interest, and the object of which is to compel them to contest the

TIT. IV. matter between themselves, without involving  
 CAP. II. him in any vexatious litigation respecting it.  
 — (See St. § 806 and notes, and 807, 810—  
 816, 820, 824; *Jones v. Thomas*, 2 Sm. &  
 Gif. 186.)

Illustrations. Thus, where a tenant is liable to pay rent, but there are several persons claiming title to it, in privity of contract or tenure, he is entitled to file a bill of interpleader to compel them to ascertain to whom the rent is payable. (St. § 811.) But if a claim to rent is set up by a mere stranger, under a title paramount, and not in privity of contract or tenure, the tenant cannot compel his landlord to interplead with such a stranger; for the demand made by the latter is not a demand of the same nature or in the same right: the stranger cannot demand the rent, as such, but if he succeeds in an ejectment, he has only a right to damages for use and occupation; whereas the landlord claims the rent, as such, in privity of contract, tenure, and title. (St. § 812.) Besides, the tenant is under a contract to pay the rent to his landlord. (St. § 817 b.)

Connexion  
 between the  
 titles of the  
 two claim-  
 ants.

Where the title of the one claimant is not derived from that of the other, nor are they both derived from the same common source,

but are independent of and adverse to each other, the party holding the property must defend himself as well as he can at Law; for if a Court of Equity were to exercise jurisdiction in such cases, it would be asserting the right to try mere legal titles, on a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader. (St. § 816, 820.)

TIT. IV.  
CAP. II.  
—

Property put into the hands of a private agent by his principal, or received by an agent for his principal, is not the subject of an interpleader, on the assertion of a claim to it by a third person under an independent adverse title; but the agent must deliver it to the principal: for the possession of the agent is the possession of the principal. And the like doctrine would prevail in favor of a third person to whom the principal, after the bailment, had transferred the right to the property, where the transfer had been recognized and assented to by the agent. (St. § 817, 817a, 818.) But if the principal has created an interest in or a lien on the funds, in the hands of the agent, in favor of a third person, and the nature and extent of that interest or lien is controverted between the principal and

Principal  
and agent.

TIT. IV. such third person, there an interpleader will  
CAP. II. lie. (St. § 817 a.)  
—

It seems essential that the person by whom a bill of interpleader is filed should be in such a position as to be able to admit the title of either claimant. Thus, a sheriff, who seizes goods on execution, cannot maintain a bill of interpleader, on account of the existence of adverse claims to the property; for, as to one of the defendants, he necessarily admits himself to be a wrong doer. (See St. § 821.)

It is not necessary that proceedings should have been commenced either at Law or in Equity, in order to found a jurisdiction for a bill of interpleader. (St. § 802.)

In order to prevent a bill of interpleader being made the instrument of delay or of collusion with one of the parties, the Courts require that the plaintiff should make an affidavit that there is no collusion between him and any of the other parties; and also, if it is a case of money due by him, that he should bring the money into Court, or at least should offer to do so by the bill. (St. § 809.)

## CHAPTER III.

OF PROTECTION FROM REPEATED OR RE-  
NEWED LITIGATION, OR FROM UNJUST  
LEGAL PROCEEDINGS, AFFORDED BY DE-  
CREES UPON BILLS OF PEACE OR BILLS  
TO ESTABLISH WILLS, AND BY INJUNC-  
TIONS.

## SECTION I.

*Of Bills of Peace.*

A BILL of Peace is a bill that is filed to es-  
tablish and perpetuate, in favor of or against  
a number of persons, some general private  
right, which, from its nature, is likely to be  
sought to be established or overthrown by  
different persons, at different times, and by  
different actions; or to confirm and perpe-  
tuate a right which has been satisfactorily  
established by two or more trials at Law, but  
is in danger of being again controverted. (St.  
§ 853, 854, 859.)

Definition of  
a bill of  
peace.

In the former of these classes of cases, Equity interferes in order to prevent multi-  
Ground of  
interference.

TIT. IV. plicity of suits ; in the latter, to prevent op-  
CAP. III. pressive litigation. (St. § 853, 854, 859.)  
SEC. I.

Instance of  
the first class  
of bills of  
peace.

An instance of the former class occurs where a bill is filed to settle the amount of a general fine to be paid by all the copyhold tenants of a manor, or to establish a right of common of the freehold tenants of a manor. (St. § 856. For other instances see § 855, 856.)

Pre-requi-  
sites to a bill  
of peace.

In most cases of this class, it is held that the plaintiff ought to establish his right by a determination of a Court of Law, before he files his bill in Equity. And if he has not done so, and the right he claims has not the sanction of a long possession, and he has any means of trying the matter at Law, a demurrer will hold ; for the object of these bills, as their name itself imports, is simply to secure the quiet enjoyment of a right which, *primâ facie* at least, clearly exists, and not to decide the question of a doubtful right. If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may file a bill to establish it, and the Court will, if it is necessary, ascertain it by an action or issue at Law, and then make a decree finally binding on all parties. (See St. § 854, and note.)

It seems that Courts of Equity, on principles of public policy, will not, on a bill of this nature, decree a perpetual injunction for the establishment or the enjoyment of the right of a party who claims in contravention of a public right. (St. § 858.)

TIT. IV.  
CAP. III.  
SEC. I.

—  
Rights in  
contraven-  
tion of pub-  
lic rights not  
protected in  
this way.

## SECTION II.

### *Of Bills to establish Wills.*

SEC. II.

The proper jurisdiction for deciding as to the validity of wills, where they are actually contested, belongs to the Ecclesiastical Court, in the case of personal estate, and to the Courts of Common Law, in the case of real estate. (St. § 1445.) Yet—

—  
Jurisdiction  
in general  
belongs to  
the eccle-  
siastical  
courts, or  
courts of  
common law.

1. The heir-at-law may, by consent, come into a Court of Equity for the purpose of having an issue to try the validity of the will. He cannot come into Equity unless by consent, because he has a legal remedy by ejectment, and if there are any impediments to the proper trial of the merits on such an ejectment, he may come into Equity to have them removed. (St. § 1447, note.)

—  
Exceptions.

2. A devisee in possession, whether legal or equitable, has an equity to have the will

TIT. IV.  
CAP. III.  
SEC. II.  
—

established against the heir, although the heir has brought no action of ejectment against the devisee, and although no trusts are declared by the will, and although it is not necessary to administer the estate under the direction of the Court of Chancery. (*Boyse v. Rossborough*, 1 Kay, 71, 102, 111; 1 K. & J. 124, 139; 3 D. M. & G. 817.)

3. And where a will is contested, and it is necessary to establish its validity, in order to accomplish purposes which it is the province of Courts of Equity to effect (such as the execution of trusts, the marshalling of assets, &c.), the latter will exercise jurisdiction in the following manner: Where the will is of personal estate, and a probate thereof is produced from the Ecclesiastical Court, but the parties are dissatisfied with the probate, the Court of Equity in which the controversy is depending will suspend the determination of the cause, in order to enable the parties to try the validity of the will before the proper Ecclesiastical tribunal, and it will then govern itself by the result. If the will is of real estate, the Court will direct an issue to be tried, or an ejectment to be brought at Law, to decide the question of the validity of the will, and will govern its own judgment by the re-



sult. If the will is established in either case, a perpetual injunction may be decreed. (St. § 1445—6.) But Courts of Equity will not feel themselves bound by a single verdict, if it is not entirely satisfactory, but will direct new trials, until there is no longer any reasonable ground for doubt. (St. § 1447.)

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CAP. III.  
SEC. II.

### SECTION III.

#### *Of Injunction to restrain Proceedings at Law.*

SEC. III.

A writ of injunction is a judicial process whereby a party is required to do, or to refrain from doing, a particular thing. (St. § 861, 862.)

Definition of  
an injunction.

Injunctions to restrain proceedings at Law are either common or special. A common injunction is one that is issued upon and for default of a defendant in not appearing to or answering a bill, in order to restrain him from proceeding at Law touching the matter in the bill, till he shall have fully answered the bill, and cleared his contempt, and the Court shall make other orders to the contrary. It is also granted where the defendant obtains an order for further time to answer.

Common in-  
junctions.

TIT. IV. This kind of injunction was of course; but  
 CAP. III. in consequence of the Stat. 15 & 16 Vict.  
 SEC. III. c. 86, s. 58, a *primâ facie* case must now be made by the bill, and must be supported by affidavit. (*Senior v. Pritchard*, 16 Beav. 473; *Lovell v. Galloway*, 17 Beav. 1.)

Special in-  
junctions.

Injunctions upon other occasions, or involving other directions, are called special injunctions. (St. § 892.) And the granting or refusing of them is a matter resting in the sound discretion of the Judge. (St. § 863.)

Injunctions  
granted at  
any stage of  
the legal suit,

Injunctions to restrain proceedings at Law may be perpetual or temporary, total or partial, qualified or unconditional. (St. § 886.) And they may be granted at any stage of the legal suit. Thus an injunction is sometimes granted to stay trial; sometimes after verdict, to stay judgment; sometimes after judgment, to stay execution; sometimes after execution, to stay the money in the hands of the sheriff, if it is a case of *feri facias*, or to stay the delivery of possession, if it is a writ of possession. (St. § 886.) There is an almost infinite variety of occasions on which an injunction may issue to stay legal proceedings. (St. § 884.) In general it may be stated that an injunction will issue in all cases where, by accident, fraud, or otherwise, it

and on a va-  
riety of occa-  
sions.

would be against conscience to proceed in another Court. (St. § 878—885, 887, 889.)

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CAP. III.  
SEC. III.

Bills for an injunction restraining a person from availing himself of a judgment actually obtained at Law, which it would be against conscience to execute, are usually called Bills for a New Trial. (St. § 887.) They have not been countenanced much of late years. In general it has been considered that the ground must be such as would be a ground for a bill of review of a decree in Equity on the discovery of new matter. (St. § 888.) And Courts of Equity will not relieve against a judgment at Law, or in a foreign Court, upon a ground which could have been used and would have been available as a defence at Law or in such foreign Court. So that no relief will be granted where the party aggrieved has been guilty of laches in omitting to procure the proper proofs before the trial by means of a bill of discovery, or in neglecting to apply for a new trial within the proper time. Nor will relief be granted upon a ground which has been fully and fairly tried at Law or in a foreign Court. (St. § 887, 894, 895, 895 a.)

Bills for an  
injunction  
after judgment.

The Court of Chancery will not stay proceedings in any criminal matter, or in any

Injunction  
not granted  
against any

TIT. IV.  
CAP. III.  
SEC. III.

proceedings  
not strictly  
of a civil na-  
ture.

cases not strictly of a civil nature, such as proceedings on a *mandamus*, or an indictment, or an information, or a writ of prohibition, unless the parties who are seeking redress by such proceedings are also plaintiffs in Equity, proceeding at the same time, in regard to the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution. (St. § 893.)

Not even  
against civil  
proceedings  
in all cases.

Nor will the Court grant an injunction against any legal proceedings on the ground of a mistake in pleading or in the conduct of the cause; for a party has no right to invoke the aid of a Court of Equity, or to subject the opposite party to fresh litigation, in order to remedy the consequences of the unskilfulness, carelessness, or inadvertence of those whom he employs. Nor will such an injunction be granted on the ground of a failure in obtaining fresh evidence, or merely to let in new corroborative proofs; for that would be to keep alive litigation: nor on the ground that a question of Law has been erroneously decided by a Court of Law; for that would be to constitute the Court of Chancery a Court of Appeal. (See St. § 897.)

Injunction is  
addressed to  
the parties,  
not to the  
court.

The writ of injunction is not addressed to the Courts in which or by whose authority the prohibited proceedings are carried on.

It does not affect to interfere with them. It is directed only to the parties, prohibiting them from making an unfair use of the proceedings of a Court of Law. (St. § 875.)

TIT. IV.  
CAP. III.  
SEC. III.

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On similar principles, where both the parties to a suit in a foreign country are residing within another country, the courts of the latter country have full authority to act on them, whether by injunction or otherwise, with regard to such suits; because they can act on the parties *in personam*, without presuming to direct or control the foreign Court. (St. § 899, 900.)

Injunction  
against a suit  
in a foreign  
country.

## CHAPTER IV.

OF PROTECTION FROM LOSS OR INJURY, IN  
OTHER CASES, BY INJUNCTION.

**Jurisdiction.** THE jurisdiction in granting injunctions, in such cases, has arisen either from the want of any legal remedy, or from the imperfection and inadequacy of the legal remedy in cases where any such remedy exists. (St. § 864.)

By "The Common Law Procedure Act, 1854," 17 & 18 Vict. c. 125, s. 79—82, the power of granting injunctions in certain cases is given to the Superior Courts of Common Law. This, however, does not oust the jurisdiction of the Court of Chancery, but only gives concurrent jurisdiction to the Courts of Common Law.

Injunctions  
are either  
temporary or  
perpetual;

Injunctions, when granted on bills, are either temporary, as until the coming in of the defendant's answer, or until the further order of the Court, or until the hearing of the cause, or until the coming in of the report of a Master; or they are perpetual, as when they form a part of the decree after

the hearing, and amount to a perpetual prohibition. (St. § 873.)

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CAP. IV.

Injunctions may be also either total or partial, qualified or unconditional. (St. § 886.) And some are of a preventive, others of a restorative character. The former are the most common. (St. § 862.)

total, or partial; qualified, or unconditional; preventive, or restorative.

An injunction will not be granted, unless specially prayed for by the bill; because the defendant might make a different case by his answer against the general words of the bill, from what he would make against the special prayer for an injunction. (St. § 863.)

Injunction must be prayed for.

Courts of Equity constantly decline laying down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld. (St. § 959 b.) And it would seem, that unless some special reason intervenes, they will in all cases grant an injunction to protect their own officers, who execute their process, against any suit brought against them for acts done under or by virtue of such process (St. § 891); and to restrain persons from making an unfair use of a Court of Law, which we have considered in the preceding Chapter: and to prevent any one from prejudicing another, contrary to

Equity will not limit its power of granting injunctions.

General rule as to cases where they will be granted.

TIT. IV. equity and good conscience (see St. § 903—  
CAP. IV. 908, 927—929, 951—959); so that it would

Some specific  
cases pointed  
out.

appear to be only needful to advert to a few specific cases presenting points which are not of a sufficiently obvious character to be omitted.

I. Waste.

I. An injunction will be granted to restrain voluntary waste. (St. § 912—919.) But Courts of Equity have no means of interfering in cases of permissive waste by a tenant for life. (*Powys v. Blagrove*, 1 Kay, 495; 4 D. M. & G. 448.)

Tenant for life impeachable of waste is only allowed to fell timber when, where, and in such manner as that it will be for the benefit of the succession; and he is not entitled to the timber when cut. (2 Sp. 570.)

A tenant for life under a will, unless authorized by the will, is not entitled to open any mines of coal or minerals or quarries which had not been opened at the time of the death of the testator, but may work those already opened. (2 Sp. 573.)

Equitable  
waste.

The Court of Chancery will sometimes interfere with respect to what is commonly, although with no great propriety, called equitable waste (St. § 912); that is, such destructive or injurious acts as would not be punish-



able as waste at law, because consistent with the legal rights, of the party committing them, but which are considered as waste, and as unjustifiable, in the view of a Court of Equity, as occasioning an unconscientious and irreparable injury to the interests of the other parties; as where a tenant for life without impeachment of waste, or a tenant in tail after possibility of issue extinct, attempts or intends to pull down houses, or totally to destroy a wood, or to cut down trees which were planted, even though by himself, or were left standing, for the ornament and shelter of the estate, wheresoever they may be growing. (St. § 915; 2 Sp. 570, 571.)

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CAP. IV.  
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On similar grounds, although in general the Court will not interfere by injunction to prevent waste in the case of tenants in common, or coparceners, or joint tenants, because they have a right to enjoy the estate as they please, and because they can make partition when they choose, so as to prevent future waste; yet the Court will interfere in special cases, as where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoying the estate. (St. § 916, and see 909, note.)

Waste in the case of tenants in common, coparceners, and joint-tenants.

TIT. IV.  
CAP. IV.

II. Public  
nuisances.

Private  
nuisances.

II. In the case of public nuisances, an information lies in Equity to redress the grievance by way of injunction. (St. § 923, 924 a.) In regard to private nuisances, in order to justify the interposition of a Court of Equity, there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at Law, or such as from its continuance must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction. (St. § 925, 926.)

III. Patents.

III. The Court of Chancery frequently interferes in cases of patents for inventions. (St. § 930—933.) If the patent has been recently granted, and its validity has not been ascertained by a trial at Law, and the defendant denies it, or puts the matter in doubt, there, in general, the Court will not grant an immediate injunction, but will require the validity of the patent to be ascertained in a Court of Law, retaining the bill in the mean time. But if the patent has been granted some length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for such a period of time that there is a fair ground for presuming that he has an

exclusive right, the Court will ordinarily interfere by way of preliminary injunction, pending the proceedings ; reserving, of course, until the ultimate decision of the cause, its own final judgment on the merits. And an injunction will be granted after the time limited for the expiration of a patent, to restrain the sale of articles manufactured in violation of the patent, while it was in force. (St. § 934.)

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CAP. IV.  
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IV. Courts of Equity often afford protection to copyrights, and act upon similar principles with respect to the title. (St. § 935, 949, 950.)

IV. Copy-  
rights.

If a work is of a clearly irreligious, immoral, libellous, or obscene character, they will not protect it. (St. § 936—938.)

It is not an infringement of the copyright of a book to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it, or to make a *bonâ fide* use of the same common matter in the compilation of another work. But what constitutes a *bonâ fide* case of extracts, or a *bonâ fide* abridgment, or a *bonâ fide* use of the same common materials, is often a matter of most embarrassing inquiry. (Upon this subject, see St. § 939—942, and notes.

TIT. IV.  
CAP. IV.

V. Letters.

V. Courts of Equity will also restrain the publication of private letters, whether of a literary character or otherwise, where the publication is attempted without the consent of the author. The property which the receiver has in letters is of a qualified kind; for the property, beyond the purpose for which the letter is sent, is in the sender. To permit the receiver to publish letters of a literary character, would be allowing him to sell or give away that which belongs and may be of value to another; and to permit the receiver to publish letters of other kinds, would be allowing a practice which must prove most prejudicial to the interests of society. (St. § 944—948.)

VI. Applications to Parliament on private grounds may be restrained by injunction; but applications on public grounds cannot be restrained. (*Lancaster and Carlisle Railway Company v. North Western Railway Company*, 2 K. & J. 293.)

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Courts of Equity effectuate their own decrees in many cases, by enjoining parties to yield up, deliver, quit, or continue the possession. (St. § 959.)

## CHAPTER V.

OF PROTECTION FROM ANOTHER'S ABSCONDMENT, BY THE WRIT OF NE EXEAT REGNO; AND OF PROTECTION BY THE WRIT OF SUPPLICAVIT.

I. THE writ of *ne exeat regno* is a prerogative writ which is issued to prevent a person from leaving the realm (St. § 1465), even though his usual residence is in foreign parts. (2 Sp. 15.)

I. Writ of *ne exeat regno*.

It was originally applied only to great political purposes. (St. § 1467.) And although it is now applied in certain cases by custom to private civil matters only, yet it is employed with great caution and jealousy (St. § 1468), after a bill filed. (St. § 1467, note.)

Original and present us

This writ will not be granted, except in cases of equitable debts and claims; for, in regard to civil rights, it is treated in the nature of an equitable bail. (St. § 1470.)

To this, however, there are two exceptions: 1. Where alimony has been actually

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CAP. V.  
—

decreed by the Ecclesiastical Court, and no appeal is made against the decree, the writ is granted, unless the husband makes it appear that he does not intend to leave the kingdom; because the Ecclesiastical Courts cannot take bail, or because they are unable to furnish a complete remedy to enforce the due payment of alimony. (St. § 1471 and note, and 1472.) 2. Where there is an admitted balance due from the defendant to the plaintiff, but a larger sum is claimed by the latter, the writ will be issued. (St. § 1471, 1473.)

The equitable demand for which the writ will be issued, must be certain in its nature, of a pecuniary character, and actually payable, and not contingent. (St. § 1474.)

II. Writ of  
*supplicavit*.

II. The writ of *supplicavit* is in the nature of the process at the Common Law to find sureties of the peace, on articles filed by a party; as by a wife against her husband. It is rarely used now, as the remedy at Common Law is adequate for the purpose. (St. § 1476.)

## CHAPTER VI.

OF THE PROTECTION OF PROPERTY, BY TAKING  
AWAY THE POSSESSION OR RECEIPT THERE-  
OF, OR BY REQUIRING SECURITY.

I. THE Court of Chancery very frequently prevents anticipated wrong or loss, by the appointment of a receiver to receive rents and other income or profits. (St. § 826.) And such an appointment may be made even where the property is legal, and judgment creditors have taken possession of it under writs of *elegit*; for it is competent for the Court to appoint a receiver in favor of annuitants and equitable creditors, not disturbing the just prior rights, if any, of judgment creditors. (St. § 829.)

I. Appoint-  
ment of a  
receiver.

A receiver so appointed is treated as virtually an officer and representative of the Court, for the more speedy getting in of such rents, income, or profits, and the securing the same for the benefit of the person entitled to it. In the case of adverse claims, the appointment of a receiver does not at all affect

Nature of his  
office and  
possession.

TIT. IV.  
CAP. VI.  
—

the right. The Court virtually becomes the landlord *pro hac vice*, and the receiver, as an officer of the Court, is generally entitled to the possession; and his possession is treated as the possession of the Court, in the first instance, and then of the party who ultimately establishes his right to it; and, therefore, is not to be disturbed, even by an ejectment under an adverse title, without the leave of the Court. (St. § 831, 833, 833 a.)

His power.

The receiver cannot proceed in any ejectment against the tenant except by the authority of the Court. (St. § 833.) And when in possession, he has very little discretion allowed him, but must apply from time to time to the Court for authority to do such acts as may be beneficial to the estate. (St. § 833 a.)

II. Payment  
into court,  
or to the  
party en-  
titled, or  
security.

II. In other cases, the Court affords protection by an order to pay a fund into Court; in others, by directing security to be given, or money to be paid over. (St. § 826, 839—848.)

III. Deposit  
of docu-  
ments.

III. The Court will also direct that papers and writings in the hands of executors and administrators shall be deposited with the Court for the benefit of those interested, unless there are other purposes which require



that they should be retained in the hands of the executors or administrators. (St. § 842.)

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IV. The Court will not ordinarily entertain bills for the specific delivery of chattels. But where the chattel is of such a nature that the loss of it could not be fully compensated by damages, the Court will decree a specific delivery thereof. (St. § 708—710.)

IV. Delivery  
of chattels.



## TITLE V.



Of Protective Equity,  
In Favor of Persons under Disability.

## CHAPTER I.

## OF INFANTS.

**Jurisdiction.** THE care of infants, as persons who are not able to protect themselves, belongs to the Sovereign, as *parens patriæ*; and the correct opinion seems to be, that this prerogative was delegated to the Court of Chancery from its first establishment; and that the jurisdiction does not belong to the Lord Chancellor only, in virtue of his general power as holder of the great seal and as keeper of the Royal conscience (St. § 1333—1337, and notes); since the jurisdiction may be exercised as well by the Master of the Rolls as by the Chancellor, and since an appeal lies, as in other cases in which the Court of Chancery has a general jurisdiction, from the decision of the Court of Chancery to the House of Lords. (St. § 1335.)

**Appointment of guardians.** The Court of Chancery will appoint a suitable guardian to an infant, where there is no other, or no other who will or can act, at least where the infant has property. If the

infant has no property, the Court, perhaps, will not interfere; not from want of jurisdiction, but because it cannot exercise its jurisdiction usefully, without having the means of applying property for the benefit of the infant. Guardians appointed by the Court are considered as officers of the Court, and are held responsible to it accordingly. (St. § 1338.)

TIT. V.  
CAP. I.  
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The Court will remove a guardian of any kind, whenever sufficient cause can be shown for such a purpose, or will regulate and direct the conduct of the guardian in regard to the custody and education and maintenance of the infant, and, if necessary, will even appoint the school where he shall be educated, and will require security to be given, if there is any danger of injury to his person or property. (St. § 1339.)

Removal of  
guardians.

Control over  
them.

The Court will also assist guardians in compelling their wards to go to the school selected by the guardian, as well as in obtaining the custody of the persons of their wards, when they are detained from them. (St. § 1340.)

Assistance of  
guardians.

In general, parents are entrusted with the custody and education of their children, on the natural presumption that the children

Removal of  
children  
from their  
parents.

TIT. V.  
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will be properly treated, and that due care will be taken of them, in regard to learning, morals, and religion. But whenever this presumption is negatived by the actual state of the case, and a father is guilty of gross ill-treatment of his infant child, or is living in gross immorality or avowed impiety, or otherwise acts in a manner injurious to the morals or interests of his children, the Court of Chancery will deprive him of the custody of his children, and appoint a suitable person to act as guardian. (St. § 1341—1349.)

Conversion of  
the infant's  
property.

Guardians may change the nature of the property, when it is manifestly for the benefit of the infant, but not otherwise. But although it has been said that there is no Equity in such a case between the representatives of the infant, nevertheless, for the purpose of preventing any such acts of the guardian, in case of the death of the infant before he comes of age, from changing improperly, through partiality or otherwise, the rights of the parties, who, as heirs or distributees, would otherwise be entitled to the property, Courts of Equity hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty, and distri-

butable as such; and on the other hand, they treat the proceeds arising from the sale of real property, (as, for example, of timber cut down on a fee-simple estate of the infant,) as real estate. It is common for guardians to ask the sanction of the Court to any acts of this sort; and when the Court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state. (St. § 1357.)

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Sometimes infants become wards of Chancery. Properly speaking, a ward of Chancery is a person who is under a guardian appointed by the Court of Chancery. But whenever a suit is instituted in that Court, relating to the person or property of an infant, although he is not under any general guardian appointed by the Court, he is treated as a ward of the Court. (St. § 1352.)

Who are  
wards of  
Chancery.

Any act affecting the person or state or property of a ward of Chancery, unless done under the express or implied direction of the Court, is treated as a violation of the authority of the Court; and the offending party will be arrested for the attempt, and compelled to submit to such order, and to such

All acts affecting them  
must be done  
under the direction of the  
Court.

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— punishment by imprisonment, as are applied to other cases of contempt. (St. § 1353.)

Maintenance. Whenever an infant is a ward of the Court of Chancery, and a suit is depending in the Court, the Court will, of course, direct a suitable maintenance for the infant, having a due regard to his rank, intended profession or employment, property, and expectations. (St. § 1354.) And maintenance will now be ordered even where the infant is not a ward of the Court, and not resident within the jurisdiction, if he has no father, or his father is unable to maintain him. (See St. § 1354, 1354 a, 1354 b.)

Where a legacy is vested, it seems that maintenance will be ordered, though none is directed by the will, and though the interest is directed to be accumulated. (2 Sp. 462.) And though a sum be directed to be paid periodically for maintenance, until the time for the payment of the portion, the child will be entitled to a proportionate part during the interval between the last periodical payment and that time. (2 Sp. 462.)

The Court is governed by a regard to the circumstances and state of the family to which the infant belongs, in respect to the



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allowance of any maintenance at all, and to the amount of such allowance. Thus, if the father is able to maintain the infant out of his own property, the Court will ordinarily withhold all allowance from the property or income of the infant for the maintenance of the latter, even though there may be a power (as distinguished from a trust), in the settlement or will, at the discretion of the trustees, to appoint part of the income for the purpose of his maintenance and education. (St. § 1354 a, and note; 2 Sp. 462, 466.) But if there is a contract on marriage amounting to a trust that property shall be applied for the maintenance and education of the children, the property must be applied, without reference to the ability of the father to maintain and educate them. And in the case of a legacy given by a stranger, the interest of it may be so given or directed to be applied, as to be in substance a gift to the father, or rather for his relief. (2 Sp. 466—468.) And if the infant is an eldest son, and the younger children have no provision made for them, an ample allowance will be decreed to the infant, so that the younger children may be maintained. And the Court will act in a similar way where the father or mother

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of the infant is in distress or narrow circumstances. (St. § 1355; 2 Sp. 461, 462.)

The Court, however, in allowing maintenance, almost always confines it within the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, part of the capital will sometimes be directed to be applied for the purpose. But without the express sanction of the Court, a trustee or guardian should not so apply any part of the capital. (St. § 1355; 2 Sp. 461.)

The words “maintenance, education, and bringing up,” standing together, have reference to minority only. But where the interest of a fund is directed to be applied for the “maintenance and education” of a person, though at the time an infant, he is generally speaking entitled to the interest during his life. “Education” includes maintenance. Where maintenance is given during minority, as a general rule it does not cease on the marriage of the child. (2 Sp. 460.)

Where the income of property is given to the mother for the maintenance of herself and her children, she is to receive the whole income, and maintain the children out of it, so long as they form part of her family; but

when they are forisfamiliated, as by marriage, they lose the right to maintenance. (2 Sp. 461.)

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Where infants resident here became entitled to personal property, under the decree of a foreign tribunal, it will be administered for their benefit here, just as any other property. (2 Sp. 13, 14.)

Property decreed to infants by foreign court.

If a man should marry a ward of Chancery without the consent of the Court, even though with the consent of the guardian, he, and all others concerned in aiding and abetting the act, will be treated as guilty of a contempt of Court; and even though he was ignorant that she was a ward of the Court, he will be deemed guilty of a contempt. (St. § 1358.)

Marriage of a ward of the court without its consent.

Where the Court appoints a guardian or committee in the nature of a guardian, to have the care of an infant, it is accustomed to require the guardian or committee to give a recognizance that the infant shall not marry without the leave of the Court; so that if the infant should marry even without the knowledge or neglect of the guardian or committee, yet the recognizance would in strictness be forfeited, whatever favor the Court might think fit to show to the party,

Recognizance that a ward of court shall not marry.

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when he should appear to have been in no fault. (St. § 1359.)

Interdiction  
of intended  
marriage of  
a ward of  
court, and of  
addresses.

Where there is reason to suspect an improvident marriage, without its sanction, the Court will, by an injunction, not only interdict the marriage, but also all communications between the ward and the admirer; and if the guardian is suspected of any connivance, the Court will substitute a committee in his stead. (St. § 1360.)

Settlement  
on a ward of  
court.

In case of an offer to marry a ward of Court, the Court will inquire and ascertain whether the match is a suitable one, and what settlement ought to be made on the marriage; and it is not competent to the parties, by delaying the marriage until the wife has come of age, to defeat the settlement approved by the Court. (2 Sp. 499.) And when a man has been committed for a contempt in marrying a ward of Court without its sanction, he will not be discharged until he has actually made such a settlement as shall have been deemed proper by the Court. And this will be the case even where the ward has subsequently come of age, and is ready to waive her right to a settlement; for the Court will protect her against her own indiscretion and

the undue influence of her husband. (St. § 1361.)

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The Court of Chancery will exercise a vigilant care over infants in their management of the property; and will also aid and protect infants against other persons than those who are guardians; such, for instance, as intruders upon the estate. (St. § 1356.) (a)

Control over  
guardians  
and others  
for the bene-  
fit of infants.

(a) On the subject of infants, see 1 Will. IV. cc. 60, 65; 13 & 14 Vict. c. 60; and 15 & 16 Vict. c. 55.

## CHAPTER II.

## OF PERSONS OF UNSOUND MIND.

**Jurisdiction.** THE Sovereign, as *parens patriæ*, had, from the first, the care of idiots and lunatics who had no other guardian. But the Statute 7 Ed. II. c. 9, or some early statute, besides giving the King the custody of idiots, also vested in him the profits of the idiot's lands during his life, as a beneficial interest. And with respect to lunatics, the Statute 17 Ed. II. c. 10, enacted, that the King should provide that their lands and tenements should be kept without waste; which makes him a trustee for them. Thus, the Crown has both general authority as *parens patriæ*, and a specific authority, and, in the case of idiots, a beneficial interest also, vested in it by Statute. And as the Chancellor is the person by whom the Crown exercises its powers, he acts in a twofold capacity; in some respects, under the special warrant, by the sign manual, in exercise of the right and power conferred by the Statute; in others, as keeper of the

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Royal conscience, and delegate of the Crown, in its character of *parens patriæ*. The warrant gives to the Chancellor the right of providing for the maintenance of idiots and lunatics, and for the care of their persons and estates, and no more. But the Chancellor is in the habit of making many orders, and enforcing them by attachment; which orders, and the manner of enforcing them, are not warranted by the sign manual, but are warranted by the general power of the Court. Yet the Chancellor does not act as an Equity Judge, as administering the general powers of a Court of Equity, when he makes these orders and enforces them by attachment; for if he did, an appeal would lie to the House of Lords (see St. § 1336, 1362, 1363, 1364, and note); whereas, although from a decree made on a bill filed relating to a lunatic's estate, in the regular course of Equity Jurisprudence, an appeal lies to the House of Lords, yet an appeal from an order made on motion or petition in lunacy lies to the Judicial Committee of the Privy Council. (Macqueen's Appellate Jurisdiction, pp. 99, 754, 752, &c.) The Chancellor, in making such orders and enforcing them, acts merely by virtue of his power as keeper of the

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Queen's conscience, and delegate of the Crown, but as he exercises this authority when sitting in the Court of Chancery, he is clothed with the general power of the Court.

Jurisdiction in lunacy has been recently given to the Lords Justices of the Court of Appeal in Chancery.

The jurisdiction extends not only to idiots and lunatics, properly so called, but also to all persons who, from age or other misfortune, are incapable of managing their own affairs, and therefore are properly deemed of unsound mind or *non compotes mentis*. (St. § 1365.) And a commission of lunacy may issue where the lunatic has property within this country, although he is domiciled abroad. (St. § 1365 a.)

Transactions  
with persons  
of unsound  
mind.

Some observations have already been made on transactions with such persons, in the Chapter on Actual Frauds. (a)

(a) On the subject of persons of unsound mind, see 1 Will. IV. cc. 60, 65; 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; 16 & 17 Vict. c. 70.



## CHAPTER III.

## OF MARRIED WOMEN.

AT the Common Law, the being or legal existence of the wife, for almost all purposes, is considered as merged in that of the husband. (See St. § 1367.) But Courts of Equity, in many respects, treat husband and wife as distinct persons. (St. § 1368.)

Common law doctrine.

In illustration of this, let us consider,

I. The powers which they have, in Equity, of contracting with, and giving and granting to, each other.

Division of the subject of the doctrines of equity as to married women.

II. The wife's pin-money and paraphernalia.

III. The wife's separate estate.

IV. The equity of the wife to a settlement or maintenance out of her own property.

V. Some points respecting deeds of separation.



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## SECTION I.

*The Powers which Husband and Wife have in Equity, of Contracting with, and Giving and Granting to, each other.*

I. Contracts  
before marriage.

I. At Law, contracts made between husband and wife before marriage, are extinguished by the marriage, if they are for debts or things due *in præsentia*, or at or on a future time or event which may occur during, and not after the determination of, the coverture. But Courts of Equity, although they generally follow the same doctrine, will enforce such contracts, where it would be in furtherance of the manifest intention and object of the parties to do so; as in the case of an agreement by husband and wife for the mutual settlement of their estate, or of the estate of either of them on the other, on the marriage, even without the intervention of trustees. (St. § 1370, 1371.)

II. Contracts  
after marriage.

II. Contracts made between husband and wife, after marriage, are a mere nullity at Law; but under particular circumstances, they will be enforced in Equity, where they are of a reasonable nature. Thus, if the husband should contract with his wife, for good reasons,

that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in Equity. (See St. § 1372; *Hewison v. Negus*, 16 Beav. 594.) So the wife may even become a creditor of her husband; and her rights, as such, will be enforced against him and his representatives. Thus, if a wife should raise money out of her estate, to answer his necessities, whatever be the mode adopted to carry that purpose into effect, she would, in Equity, be entitled to reimbursement out of his estate. (St. § 1373.)

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III. Gifts and grants too, whether express or implied, by a husband to his wife, after marriage, although ordinarily void at Law, will be enforced in Equity, if they are of a reasonable nature, and there is no ground to suspect fraud. Thus, gifts made by the husband to the wife to purchase clothes or personal ornaments, or for her separate expenditure and personal savings and profits made by her in her domestic management, which the husband allows her to apply to her own separate use, will be held to vest in her, as against her husband, but not as against his creditors, an unimpeachable right of property therein, so that they may be

III. Gifts  
and grants  
after marriage.

TIT. V. treated as her separate estate, if such gifts  
 CAP. III. are established by clear and incontrovertible  
 SEC. I. evidence. (St. § 1374, 1375.)

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## SECTION II.

### SEC. II.

### *Pin-Money and Paraphernalia.*

#### I. Pin-money.

I. Pin-money is not deemed to be an absolute gift: it is not considered like money set apart for the sole and separate use of the wife during coverture; but it is a sum payable by the husband to the wife, in virtue of a particular arrangement, and to be applied by the wife in attiring her person in a manner suitable to the rank of her husband, and in defraying other personal expenses—a sum allowed to save the trouble of a constant recourse by the wife to the husband, in order to meet her ordinary personal expenses. (See St. § 1375 a, and note; 2 Sp. 500, 501.)

#### Arrears thereof.

Such being the peculiar nature of this provision, the wife cannot make a sweeping disposition of it, as she can of her separate estate. And Courts of Equity refuse to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement. For, setting aside the presumed satisfaction by acquiescence, the

money is meant to dress the wife during the year, so as to keep up the dignity of the husband, and not for the purpose of accumulation. And, on the same principle, the personal representatives of the wife are not allowed to make any claim even for arrears of a year. (St. § 1375 a, and note; 2 Sp. 501.)

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II. The wife's paraphernalia are personal apparel and ornaments of the wife, suitable to her rank and condition in life. (St. § 1376.) Old family jewels, though worn by the wife, do not constitute part of her paraphernalia, unless she has acquired them by gift or bequest. (*Jervois v. Jervois*, 17 Beav. 566.)

II. Paraphernalia.

At Law, the husband may, in his lifetime, but not by his will, dispose of the wife's paraphernalia, with the exception of necessary apparel. And they are liable to the claims of creditors with the like exception. And if the articles were given by the husband, either before or after marriage, Courts of Equity fully recognize this right of the husband and his creditors, instead of treating the articles as absolute gifts to the wife, as her own separate property; although, in the case of creditors claiming against the assets

Rule of law respecting them.

Rule of equity, where they were given by the husband:

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where given  
by any one  
else.

of the husband, the personal assets of the husband will be marshalled against his representatives in favor of the widow. But if the articles were bestowed on the wife by any one else, they will be deemed absolute gifts to her separate use; and then, if received with the consent of the husband, neither he nor his creditors can dispose of them. (St. § 1376, 1377.)

### SECTION III.

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#### *The Wife's separate Estate.*

I. Means of  
acquiring it.

I. With regard to the means of acquiring a separate estate—

1. By gift,  
grant, devise,  
or settle-  
ment.

1. Whenever real or personal estate is given, granted, devised to, or settled on, a woman, either with or without the intervention of trustees, whether after marriage, or as a provision for marriage, or not in contemplation of immediate marriage, and whether by her husband, or by a mere stranger, it will be deemed separate estate, if it appears, beyond any reasonable doubt, that the property was intended for her separate use. (St. § 1380, 1381, 1384; 2 Sp. 502, 507—511.) Thus a bequest to a mar-

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ried woman "for her own use, and at her own disposal," has been held to be a bequest to her separate use. So money paid to the husband "for the livelihood of the wife" will be construed a gift to her separate use. (St. § 1382; 2 Sp. 507.) But where the expressions do not clearly show that the husband is to be excluded from his marital rights, the wife will not take for her separate use. Thus, in the case of a direction to pay money into her own proper hands "for her own use and benefit," it has been held that although the money is to be for her own use, yet there is nothing in that inconsistent with its being subject to the husband's marital rights. (St. § 1383; 2 Sp. 508—511.)

2. By the custom of London, a married woman may carry on trade within the City, as a sole trader, and be liable as such. But, independently of any such custom, if it is agreed between the husband and wife, before marriage, that the wife shall be allowed to carry on a separate trade, such an agreement will be maintained at Law against the husband; and being an agreement for valuable consideration, namely, that of the intended marriage, it will also be maintained at Law against his creditors. And if such

2. By carrying on a separate trade in London; or even elsewhere, by agreement before marriage;

by agreement after marriage;

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an agreement is made after marriage, and trustees are interposed, it will be maintained at Law against the husband ; and if it is on valuable consideration, against his creditors also ; for, in such case, the wife's trustees will, at Law, be entitled to the property assigned, and to the increase and profits thereof, and she will be considered at Law, as their agent, and her possession as their possession. The trustees, however, will be regarded in Equity, as holding such property, and receiving the increase and profits thereof, for the sole and separate use of the wife. And thus, in such cases, where trustees are interposed, the beneficial interest in the property, and the increase and profits thereof, are secured to the wife by the joint operation of Law and Equity. By the operation of Law, the legal estate is vested in the trustees, and taken out of the power of the husband. By the operation of Equity, the beneficial interest is vested in, and secured to, the wife, against her husband, and if the agreement is for valuable consideration, against his creditors also. But even where there are no trustees interposed, such an agreement has the force, in Equity, of creating a separate estate for the wife, and securing it against



the husband, and, if the agreement is for valuable consideration, against his creditors also. And this is the case even though it be a mere implied agreement. So that if the husband should permit his wife, after the marriage, to carry on business on her sole and separate account, all her earnings in the trade will be her separate property. And if a husband should desert his wife, and she should be enabled, by the aid of her friends, to carry on a separate trade, her earnings in such trade will be enforced in Equity against her husband. (See St. § 1385—1387; 2 Sp. 503.)

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even though  
the agree-  
ment be  
merely im-  
plied.

Where the property is vested in trustees, care must be taken that the negotiations are not carried on in the name of the wife, as by taking notes or other securities in her name; for then they will, at Law, be held to belong to the husband, although it will be otherwise in Equity. (St. § 1386.)

II. As to the wife's power of disposing of her separate estate, all prenuptial agreements for securing to the wife separate personal property, will confer on her, in Equity, unless the contrary be expressly stipulated or implied, the same power of disposing of such separate property, by will or otherwise, as an

II. Wife's  
power of dis-  
posing of se-  
parate estate,  
where it has  
arisen from a  
prenuptial  
agreement.

TIT. V. unmarried woman would have. (St. § 1390 ;  
CAP. III.  
SEC. III. 2 Sp. 506, 507.)

Where it has  
arisen from a  
postnuptial  
agreement of  
the husband.

With respect to her power of disposing of her separate property, where no trustee is interposed, and it rests merely on a post-nuptial agreement of the husband, if the property consists of personalty, or an estate for life in real property, her disposal thereof can affect her husband's rights alone ; and therefore his assent is conclusive upon him. And if real property is settled upon her in fee in trust for her separate use, without any special power of disposition, she may dispose of or charge the rents and profits accruing during her life ; but she can only dispose of the inheritance by the ordinary means by which married women dispose of their real property ; because, in regard to real estate, her own heirs are or may be affected in their interest by descent. (St. § 1391 ; 2 Sp. 504, 513.)

Where it is  
given by a  
third person  
before or  
during the  
coverture.

And where an estate of inheritance is given her by a third person, during the coverture, or, as it seems, before coverture, for her separate use, she will not be able to dispose of it, except by these means, unless the power of disposing of it during the coverture is expressly given her. But if such a power is expressly given her, she may dispose of the

estate, even though there are no trustees interposed to protect the execution of the power. (St. § 1388, 1392; 2 Sp. 504, 507; *Harris v. Mott*, 16 Beav. 169.)

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Where personal property, whether in possession or reversion, or a life interest in real property, is given by a third person, for the separate use of a married woman, she has, in effect, a full power to dispose of it, unless, from the words of the gift, it appears, beyond a reasonable doubt, to have been the intention of the giver that this absolute power should not exist. (See St. § 1393, 1394; 2 Sp. 513.)

A mere prohibition of alienation or anticipation is void as against a man, or a woman while she is unmarried. (See 2 Sp. 520.)

Restrictions  
against alien-  
ation or anti-  
cipation.

And it is void when annexed to a gift of real estate in fee or for life to a woman, even though at the time married, if such gift is not for her separate use. (See 2 Sp. 521.)

But a gift either of real estate, whether in fee or for life, or of personal estate, to a woman for her separate use, even though she be unmarried at the time, may be accompanied by restrictions against alienation or anticipation.

(St. § 1382 a, 1384; 2 Sp. 511, 521, 522.)

These, however, will not be inferred from any

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ambiguous expressions ; they must either be contained in express words (2 Sp. 512, 522), or be deducible by plain implication. (See 2 Sp. 522.)

Operation of  
separate-use  
clause and  
restriction  
against anti-  
cipation.

The separate-use clause, either with or without a restriction against anticipation, will be confined to the then existing or then intended coverture, or will be also applied to other covertures, according to the apparent intention. If it appears to have been intended that every husband shall be excluded, and that the clause against anticipation shall operate during every successive coverture, in such case, although the woman, while single, or when and as often as she becomes a widow, has the absolute dominion over the property, yet if she do not dispose of the property so as to put an end to the trust, and she marry again, the separate-use clause and the restriction against alienation will be revived during such and every other subsequent coverture, so long as the property is held upon the original trust. (2 Sp. 524.)

Gifts to the  
husband by  
the wife.

Where the wife bestows her separate property upon her husband, Courts of Equity examine the transaction with an anxious dread of undue marital influence ; and if they are required to give sanction or effect to

it, they will examine the wife in Court, and adopt other precautions to ascertain her unbiassed wishes. (St. § 1395; 2 Sp. 514.)

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Where the husband, with the consent of the wife, is in the habit of receiving the income of her separate estate, it is regarded as showing her voluntary choice thus to dispose of it for the benefit of the family; and he will not ordinarily be required to account for it, beyond the income received during the then last year. (St. § 1396; see 2 Sp. 514.) And the income of separate estate, where the wife is of unsound mind, will be paid to the husband for her support, if he is unable to maintain her. (2 Sp. 525.)

Husband's  
receipt of the  
income.

III. As to the liability of the wife's separate estate to her contracts, debts, and charges, a woman cannot render herself or her property liable, at Law, for any contract, debt, or other charge created by her during the coverture, not even for necessities. But a married woman having separate estate, being considered in equity as a feme sole, as regards the separate estate, with respect to the capacity of enjoying it, she is likewise considered as a feme sole with respect to the capacity of charging the estate with debts or engagements. No personal decree,

III. Liability  
of separate  
estate.

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however, can be made against her: the Court can only affect her separate estate in the hands of her trustees: she cannot bind her person at all, or her property generally, but only her separate property. (St. § 1397 and note, and 1400, note; 2 Sp. 324, 325, 504, 515—518; see remarks of Kindersley, V. C., in *Vaughan v. Vanderstegen*, 2 Drewry, 179—184.) This will be held liable for all the debts, charges and incumbrances which she expressly charges, or which, judging from the nature thereof, it may be fairly inferred that she intended to charge on her separate estate. And hence, if she gives a promissory note, or an acceptance, or a bond to pay her own debt, or if she joins in a bond with her husband to pay his debts, without reference to her separate estate, it shall be intended as an application *pro tanto* of her separate estate; because the security must have been executed with the intention that it should operate in some way, and it can have no operation except as against her separate estate. And if she employs a lawyer, upon her own responsibility, her separate estate will be liable, from the nature of the engagement. But it would seem that her separate estate would not be liable for debts of an ordinary character, for

which she gives no security, unless, at least, she is divorced and living apart from her husband. For she may, and in general must, be presumed to have intended that these should be paid by her husband. If, indeed, the contrary doctrine were held, a wife who has a separate estate would, in many cases, be disinclined to take upon herself her ordinary domestic duties, fearing lest her separate estate should be exhausted by defraying the ordinary expenses of the house; or the creation of a separate estate would often be rendered unavailing, by her encountering that risk. And in no case will the Court charge the *corpus* of the separate estate in respect of her general obligations. (See St. § 1398—1401, and notes; 2 Sp. 515, 516, and notes.)

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The capacity of a married woman to bind her separate property is only commensurate with her separate interest, and does not extend to that portion of the ownership in which she has no separate interest, but has only a power of appointment, though it be a general power. So that where she has a life interest in leasehold and other personal estate to her separate use, with a general power of appointment by will over the remainder, she does not, by exercising the power, make the



TIT. V. remainder applicable to the discharge of such  
 CAP. III. engagements as would bind her separate pro-  
 SEC. III. perty. (*Vaughan v. Vanderstegen*, 2 Drewry,  
 165.)

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## SECTION IV.

### *The Wife's Equity to a Settlement or Main- tenance out of her own Property.*

SEC. IV.

I. Equity of  
 the wife,  
 when defend-  
 ant against  
 her husband.

I. If the wife has real property, or the absolute interest in personal property (with the exception, perhaps, of a term of years), which cannot be reduced into the possession of the husband without a suit in Equity (as where the legal property is vested in trustees), and the husband applies to a Court of Equity for the purpose of reducing the property into his possession; the Court, acting upon the maxim that he who seeks equity must do equity, will not give it up to him, without requiring him to make a suitable settlement on the wife, of a part of the property, or of some other property, for her due maintenance in case of her surviving him (St. § 1404, 1405, 1410, 1418; 2 Sp. 482, 484), with a provision for the issue of the marriage (St. § 1406; 2 Sp. 488), even though the property is under £200 (*In re Cutler*, 14 Beav. 220; *In re Kincaid's Trust*,



1 Drewry, 326), unless the wife and children are already amply provided for under a prior settlement (St. § 1416), or the right to a settlement is waived or lost (St. § 1418, 1419, *infra*). In the absence of a contract to that effect, an inadequate settlement, even before marriage, of a part of her property, does not deprive her of her right to a settlement out of the residue of her property, though vested in her at the time of the marriage. (*Barrow v. Barrow*, 18 Beav. 529.)

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SEC. IV.  
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When legacies to the wife are sued for by the husband in the Ecclesiastical Courts, an injunction will be granted for the purpose of enforcing the wife's equity to a settlement. And there are instances in which, for the purpose of enforcing the wife's equity to a settlement, bills in equity have been entertained to restrain the husband from having recourse to his remedy in a Court of Common Law to reduce his wife's *choses in action* into possession. (St. § 1403; 2 Sp. 429.)

Injunction  
against pro-  
ceedings in  
other courts.

If the husband does not choose to make a settlement or provision for the wife, the Court will not ordinarily take from him the income and interest of his wife's fortune, so long as he is willing to live with and maintain her, and there is no reason for their living apart.

Refusal of  
the husband  
to make a  
settlement.

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Under such circumstances, the Court secures the fund, so as to give her the chance of taking it by survivorship, allowing the husband, under its order, to receive the income and interest, or a part of it at least. (St. § 1415. See 2 Sp. 490, 491.)

II. Equity of the wife, when defendant, as against her husband's assignees or vendees.

II. The assignees in bankruptcy or insolvency of a husband, and also his assignees for payment of debts due to his creditors generally, are bound to make a settlement on the wife out of her immediate *choses in action* and immediate absolute equitable interests in chattels personal assigned to them, in the same way, and under the same circumstances, as he would be bound to make one; for it is a general principle that such assignees take the property subject to all the equities which affect the bankrupt or insolvent or general assignor. Such assignees also take the property subject to the wife's right of survivorship, in case the husband dies before the assignees have reduced her *choses in action* and equitable interests into possession. (St. § 1411, 1421; 2 Sp. 476.) And even a specific assignee or purchaser from the husband, for valuable consideration, of her *choses in action* and equitable interests, is bound to make such a settlement. And no assignment of them

will convey any right to the assignee or purchaser against the wife, if she survives her husband, and they are not reduced into possession in his lifetime. (St. § 1412; 2 Sp. 476; *Scott v. Spashett*, 3 Mac. & Gord. 604.)

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There is this distinction, however, between the case of the husband himself and his specific assignees for valuable consideration, on the one hand, and the case of his assignees in bankruptcy or insolvency, or assignees for payment of debts generally, on the other hand:—in the case of the former, it is only necessary that the provision for the wife should commence from the death of her husband, but in the case of the latter, it is necessary that the provision should commence immediately, because the general assignment of his property renders him incapable for a time, and perhaps for ever, of affording her a suitable support. (St. § 1421.)

When an immediate provision is required.

If the assignees in bankruptcy, or other general assignees claiming title under the husband, refuse to make a settlement on the wife, the like doctrine applies to them, as to the husband himself where he refuses to make a settlement. (St. § 1415. *Supra*, p. 383.)

Refusal of the assignees to make a settlement.

If the husband assigns his wife's reversionary *choses in action* and other reversion-

Reversionary choses in action, and re-

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CAP. III.  
SEC. IV.

reversionary  
equitable in-  
terests in  
personal  
chattels.

any equitable interests in personal chattels, such assignment will not exclude her right of survivorship, although she join in the assignment, because the assignment, from the nature of the thing, cannot amount to a reduction into possession of such reversionary interest (*a*). (St. § 1413; 2 Sp. 476.)

III. Equity  
of the wife,  
when plain-  
tiff, to a set-  
tlement, on  
her hus-  
band's death,  
bankruptcy,  
or insol-  
vency.

III. Whenever the wife, as defendant, would be entitled to an equity for a settlement, out of her equitable interest, against her husband or against his assignees, she may assert it in a suit, as plaintiff, by bringing a bill in the name of her next friend. (St. § 1414; 2 Sp. 482, 484, 485.)

IV. Amount  
to be settled.

IV. The Court has a full discretion as to the amount to be settled, according to the circumstances of each case. But, at the same time, in the absence of special circumstances, the general rule or the common course has been to settle about one-half on the wife and her children. (*Walker v. Drury*, 17 Beav. 482; *Napier v. Napier*, 1 Dru. & W. 410; *Bagshaw v. Winter*, 5 De G. & Sm. 466; *McCormick v. Garnett*, 2 Sm. & G.

(*a*) For an article on the disposition of reversionary interests of married women in chattels personal, by the writer of this Manual, see 10 *Jurist*, 231, 243. But see 2 Sp. 487, and cases there cited.

37; 2 Spence, 485; 1 Bright, Husband and Wife, 241.) But where particular reasons have occurred, the Court has frequently settled the whole: as in *Marshall v. Fowler*, 22 L. J. 213 and 16 Jur. 1128 (M. R.), where the husband had taken the benefit of the Insolvent Debtors Act, and was moreover almost entirely dependent on charity; in *Re Kincaid's Trust*, 22 L. J. 395 (V. C. K.), where the husband was a bankrupt, and the fund was under £200—so small a sum that it would not have been worth while to have made any settlement at all, unless the whole had been settled; in *Re Cutler*, 14 Beav. 220, and in *Watson v. Marshall*, 1 Weekly Reporter, 523, and *Francis v. Brooking*, 19 Beav. 347, where the husband was an insolvent debtor; in *Scott v. Spashett*, 3 Mac. & Gor. 599, where, besides other special circumstances, the husband had received about double the amount of the wife's property under a previous order, and no settlement had ever been made; and in *Dunkley v. Dunkley*, 4 De G. & S. 570, 2 D. M. & G. 390; *Vaughan v. Buck*, 1 Sim., N. S., 234, and *Gent v. Harris*, 10 Hare, 383, where the husband had become bankrupt, and had deserted his wife.

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V. Substitute  
for a settle-  
ment where  
fund is  
small.

V. To avoid the expense of a settlement, where the fund allowed to the wife is small, it will sometimes be ordered to be brought into Court, or if already in Court, it will be retained there, and the dividends directed to be paid to the wife for her life. (*Bagshaw v. Winter*, 5 De G. & Sm. 466; *Watson v. Marshall*, 17 Beav. 363; *Walker v. Drury*, Id. 482.)

VI. Wife's  
equity  
waived,

VI. The Court will not insist on a settlement on the wife, if at any time before a settlement under the decree is completed, or at least before proposals are made under the decree, the wife, by her consent given in open Court or under a commission, agrees that the absolute fund shall be wholly and absolutely paid over to her husband, except in the case of a female ward of the Court of Chancery who has married without its authority. (St. § 1418; 2 Sp. 486, 488.)

or lost, or  
suspended.

The equity of the wife to a settlement may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of Court, married without its consent) should be living in adultery, apart from the husband, a Court of Equity will not direct a settlement, on her own application, as it otherwise would; be-

cause, by such misconduct, she has rendered herself unworthy of the protection and favor of the Court. In the case, however, of a female ward of Court, married without its consent, the Court will insist on a settlement, as a punishment to the husband for contempt of its authority. On the other hand, in such a case, a Court of Equity will not decree such equitable property to be paid over to the husband, on his application; for when the wife is living apart from him, he is at no charge for her maintenance; and it is only in respect to his duty to maintain her, that the Law gives him her fortune. (St. § 1419, and note, and 1419 a; 2 Sp. 486.) But we must be careful to distinguish an application which is grounded merely on general principles of equity, and an application grounded on positive vested rights under a settlement, or under a valid contract for a settlement made before marriage. In the latter case, Courts of Equity cannot refuse to protect or support those vested rights, on account of any misconduct in the wife. (St. § 1420.)

We have seen that the Court, in making a settlement on the wife, properly attends to the interests of the children. But it must be observed, that the Court attends to their

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Waiver of  
provision for  
the children.



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SEC. IV.

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interest only upon the supposition, that, in so doing, it is carrying into effect her own desire to provide for her offspring. They have no independent equity of their own; for although the husband is under a moral obligation to provide for them, yet he is not bound to provide for them in any particular way or out of any particular fund. They have only a claim to the consideration of the Court constituting part of the equity of their mother, and capable of being either expressly given up by her before the amount is ascertained, or tacitly waived by her dying without having asserted it. The right of the children to the benefit of a settlement attaches, however, on the wife's filing a bill for the purpose, or at any rate on an order directing proposals to be made; and if she should die pending the proceedings, without waiving the right to a settlement, the children may enforce their claim. (See St. § 1417; 2 Sp. 488—492.)

VII. No equity to a settlement where parties are domiciled in Scotland.

VII. By the Law of Scotland, a married woman has no equity to a settlement, and if husband and wife are domiciled in Scotland, she has no equity to a settlement (*M'Cormick v. Garnett*, 5 D. M. & G. 278), even out of the produce of real estate in England directed



to be sold. (*Hitchcock v. Glendinen*, 12 Beav. 534.)

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VIII. Although Courts of Equity do not claim any general jurisdiction to decree a suitable maintenance for the wife, out of her husband's property, when he has deserted or ill treated her, yet, whenever the wife has any equitable property, even though it be only for her life, within the reach of the jurisdiction of Courts of Equity, and the husband has deserted or illtreated or refused to maintain her, they will decree a suitable and immediate maintenance out of such equitable property, or, if it has passed into the possession of a *bonâ fide* purchaser without notice, out of other property of the husband; because the obligation of maintaining the wife is the ground on which the Law gives her property to the husband. (St. § 1408, p. 1422—1424, 1426, 1408, note.) And where the wife has an equitable interest for life only, and the husband is a bankrupt or insolvent, and therefore is, as a general rule, deprived, for a time at least, of the means of duly maintaining her, she is entitled to an allowance for maintenance out of such life interest, as against the assignees. (Story, § 1412, 1408, n.) But a married woman, even though

VIII. Equity of the wife to a maintenance in case of the husband's misconduct, or bankruptcy, or insolvency.

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CAP. III.  
SEC. IV.

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her husband does not maintain her, is not entitled, as against a particular assignee for valuable consideration of the husband, to an allowance for maintenance out of the income of real or personal estate to which she is entitled in equity, for her life only; because, if she were, purchasers would be involved in inquiries respecting the relations between husband and wife, and their other property and sources of maintenance; and the life interests of married women would become incapable of being dealt with, whatever might be the exigences of the case. (*Tidd v. Lister*, 10 Hare, 151, 153; 3 D. M. & G. 857.)

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## SECTION V.

SEC. V. *Some Points respecting Deeds of Separation.*

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As a deed of separation cannot dissolve the marriage, it does not relieve the wife from any of the ordinary disabilities of coverture. (St. § 1428.)

A deed of separation entered into between the husband and wife alone, without the intervention of trustees, is utterly void. (St. § 1428.)

A covenant for separation, whether immediate or future, is void. But the Court of

Chancery may compel parties, in pursuance of articles of separation entered into between them, to execute a formal deed of separation, quantum valeat, unless in the meantime they agree to live together. And it would seem that if a deed for immediate, and not for future separation, contains a covenant by the husband to maintain his wife, and a covenant by the trustees to exonerate him from any debts contracted for her maintenance, such covenant will be enforced so long as the separation lasts; but it will not be enforced for a longer period, even as to past separation. (St. § 1428; 2 Sp. 528; *Wilson v. Wilson*, 1 H. L. Cas. 538; 5 Id. 51, 61, 62.)

A contract in a separation deed cannot affect the property of the wife, if not settled to her separate use, or reduced into possession during the coverture. (2 Sp. 532.)

The Court will not directly or indirectly enforce a separation against the parties personally. But the Court will interfere to prevent the doing of any personal acts which, if done, would be in violation of an agreement respecting property entered into on the separation. And where by articles of separation, it is agreed that the husband shall permit his wife to live separate, and as if unmarried,

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SEC. V.

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SEC. V.  
—

without any molestation, interference, or annoyance whatever, and that a proper deed shall be executed for effectuating the object of the articles, and containing all such covenants, &c., as shall be deemed expedient for that purpose, this justifies the insertion in the deed, of a covenant that the husband will not compel, or endeavour to compel the wife, by ecclesiastical censures, or proceedings or otherwise, to cohabit or live with him; but in what way or to what extent such a covenant can be enforced, appears not to be settled. (2 Sp. 532; *Wilson v. Wilson*, 1 Ho. of Lords, 538; 5 Id. 40, 51, 52, 60—63, 71, 72; *Sanders v. Rodway*, 16 Beav. 207.)

Reconciliation puts an end to a deed of separation, as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate. (2 Sp. 532.)

TITLE VI.



Of Auxiliary Equity.

## CHAPTER I.

OF A DISCOVERY IN AID OF A SUIT OR  
DEFENCE IN ANOTHER COURT.

Definition of  
a bill of dis-  
covery.

EVERY bill may properly be deemed a bill of discovery. But that which in Equity is emphatically called a bill of discovery, is a bill which asks for no relief, but simply seeks a discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or proceeding in another court. (St. § 1483.)

Discovery in  
aid of a  
foreign suit,

or a suit not  
yet com-  
menced.

It is immaterial whether the Court be situate in the same country, or in a foreign country in amity with the country where the bill is filed. (St. § 1495.) And it is not necessary that the suit should be already commenced, to which the bill of discovery is to be auxiliary, if the discovery is indispensable, in order to enable the party rightly to proceed. (See St. § 1483, 1495.)

These bills, however, may be resisted on the following grounds: 1. That the subject is not cognizable in any municipal Court. 2. That the Court will not lend its aid to obtain a discovery for the particular Court for which it is wanted. 3. That the plaintiff is not entitled to the discovery by reason of some personal disability. 4. That the plaintiff has no title to the character in which he sues. 5. That the value of the thing sued for is beneath the dignity of the Court. 6. That the plaintiff has no interest in the subject-matter or title to the discovery required (St. § 1489, 1490); as where the plaintiff is only heir apparent. (St. § 1490.) 7. That the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery. 8. That the policy of the Law exempts the defendant from the discovery (St. § 1489): as if a bill of discovery is filed against a married woman, to compel her to disclose facts which may charge her husband; or where the bill seeks to compel a counsel or solicitor to disclose the secrets of his client. (St. § 1496.) 9. That the discovery relates to the defendant's case, and not to the plaintiff's case. (St. § 1489, 1490, note.) So that even

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Discovery  
may be re-  
sisted on cer-  
tain grounds.

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CAP. I.

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an heir-at-law has not a right to the inspection of deeds in the possession of a devisee, unless he is an heir in tail; in which case he is entitled to see the deeds creating the estate tail. (St. § 1491, 1492.) But if a bill filed by a defendant at law suggests specific defects in the title of his adversary, the discovery will be granted, although the case made by the bill is not the assertion of an affirmative title in the party bringing the bill. (St. § 1493 a, note.) 10. That the discovery is not material in the suit. (St. § 1489, 1497.) 11. That the defendant has no interest in the suit, but is a mere witness (St. § 1489, 1499); unless the bill charges him with fraud; as in the case of an attorney who has assisted a client in obtaining a fraudulent deed (St. § 1500); or unless he is the officer of a corporation; in which case he may be made a party to a bill for discovery against such corporation, on the ground, it has been said, that a corporation, being an artificial person, cannot be compelled to make any discovery on oath. (St. § 1501.) 12. A discovery may in general be resisted where it would disclose circumstances that would subject the defendant to a penalty or forfeiture, or to a criminal prosecution, or



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CAP. I.  
—

to ecclesiastical censures. To this rule, however, there are various exceptions; as in the case of fraud or conspiracy, or a statutory prohibition of resisting a discovery, or an express or implied contract not to resist discovery. (See St. § 1494, and note, and Story's Eq. Plead. c. xi., and 1 Dan. C. P., by Headlam, 517—525.) 13. A discovery may also be resisted on the ground that it is perfectly clear that the action or defence is not maintainable at Law. (St. § 1493 a.) 14. That the Court where the suit is brought has always had the power of eliciting the facts without the aid of a bill of discovery (St. § 1495). But although a party may now examine his opponent at law under the Stat. 14 & 15 Vict. c. 99, s. 2, and under the Stat. 17 & 18 Vict. c. 125, s. 51—54, and the Courts of Common Law can now compel the production of documents under the 6th section of the former Act and the 50th section of the latter Act, yet a defendant at law is entitled to a discovery in Equity in aid of his defence. (*Lovell v. Galloway*, 17 Beav. 1; *Senior v. Pritchard*, 16 Beav. 473.) 15. A discovery may also be resisted on the ground that it is in aid of a controversy pending before arbitrators, who, not being the regular

TIT. VI. tribunals for administering justice, but judges  
CAP. I. of the party's own choice, must submit to  
the inconvenience incident to their position.  
(St. § 1495.) 16. In general, arbitrators are  
not compellable to disclose the grounds on  
which they made their award. (St. § 1498.)  
17. That the defendant is a *bonâ fide* pur-  
chaser for valuable consideration, and with-  
out notice, who has paid his purchase money,  
and has an equal equity with the plaintiff  
(St. § 1502, 1503); or that the defendant is  
a sub-purchaser, whether with or without  
notice, from such *bonâ fide* purchaser without  
notice. (St. § 1503 a.) But a judgment  
creditor by *elegit* is not deemed a purchaser  
within the above rule. (St. § 1503 b.) 18.  
A jointress is entitled to protect herself against  
a disclosure of her jointure deed, if the  
party seeking the discovery is not capable of  
confirming the jointure, or if, being capable,  
he does not offer to confirm it. If he is capa-  
ble and offers to confirm it, the discovery  
will be granted as soon as the confirmation is  
made, but not before; for otherwise it might  
happen, that after the discovery, his offer  
might become ineffectual by the intervention  
of other interests. (St. § 1054.)

## CHAPTER II.

## OF THE TAKING AND PRESERVING OF TESTIMONY IN AID OF A SUIT OR DEFENCE IN ANOTHER COURT.

ONE species of bill filed for this purpose is a bill to perpetuate testimony, which is a bill filed to preserve and perpetuate testimony, when it is in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. (St. § 1506.) Thus, when the plaintiff's title is in remainder, or when he himself is in actual possession of the property, or when he is in present possession of the rights which he seeks to perpetuate by proofs, he is necessarily unable to bring his disputed interest into immediate judicial investigation; and therefore Courts of Equity will entertain a suit to secure the proofs on which his title depends; for otherwise such proofs might be lost by the death of his witnesses, and the adverse party might purposely delay his suit with a view to that very event. (St. § 1508.) An instance of

Bill to perpetuate testimony.

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this occurs where a devisee, in order to perpetuate the testimony of witnesses to the will, exhibits a bill against the heir setting forth the will *verbatim*, and suggesting that the heir is inclined to dispute its validity; and then, when the cause is at issue, witnesses to the will are examined, after which the cause is at an end; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in Chancery. (St. § 1506.)

Courts of Equity will not perpetuate testimony in support of a right which may be barred by the defendant. (St. § 1511.)

Such a bill may be filed in relation to mere personal demands, and even in cases of penalty or forfeiture. (St. § 1509.)

Bill to take  
testimony  
*de bene esse*.

Another kind of bill of a similar character, but founded on distinct circumstances, is a bill to take testimony *de bene esse*, which is one that is filed to preserve testimony respecting a vested interest in the plaintiff, which is the subject of an action already commenced, and which depends on the testimony of a single witness, or on the sole testimony of aged or infirm persons, or on testimony that cannot be given *vivâ voce* in the ordinary way. Thus, an order will be

made to take the testimony of persons who are seventy years of age, or of persons who are unable to travel, or of those who are going abroad and likely to die before the time of the trial. And the Court will even entertain a bill to preserve the testimony of a witness who is capable of attending, if he is a single witness to an important fact in the cause. (St. § 1513, 1514.)

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—

Where a person is able to bring a matter into immediate judicial investigation, and yet he has not commenced any suit, the Court will not entertain a bill of any kind to take and preserve testimony in his favor. For, if, in such case, the evidence may be procured *vivâ voce* in the ordinary way, there is no need whatever of having recourse to written depositions in place of *vivâ voce* evidence. (St. § 1508.) And even if the evidence cannot be procured in the ordinary way, yet a bill to take the testimony *de bene esse* will not be entertained except in aid of a suit already commenced; because if it were, the plaintiff in the bill, having obtained the written testimony of his own witnesses, might delay his action until their death, so that they might be guilty of the grossest perjury, and yet go unpunished, and also until the death of those

When a bill to take and preserve testimony will not be entertained.

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CAP. II.

—

witnesses for the adverse party who were able to give their testimony in the usual way, and thus the justice of the case might be entirely defeated. (See St. § 1508 and note, and 1513, note.)

Commissions to take the testimony of witnesses abroad, although confined to civil actions, are grantable in cases of civil tort, such as libel. (St. § 1515.)

When depositions taken on such bills are not allowed to be used.

Even where an order is made to take the written depositions of witnesses, on a bill to perpetuate testimony, or to take testimony *de bene esse*, they will not be allowed to be used, if the witnesses are alive, and capable of attending, and within the jurisdiction at the time of the trial. (St. § 1507, 1508, note, 1512, 1513, note, and 1516, note.)

THE END.

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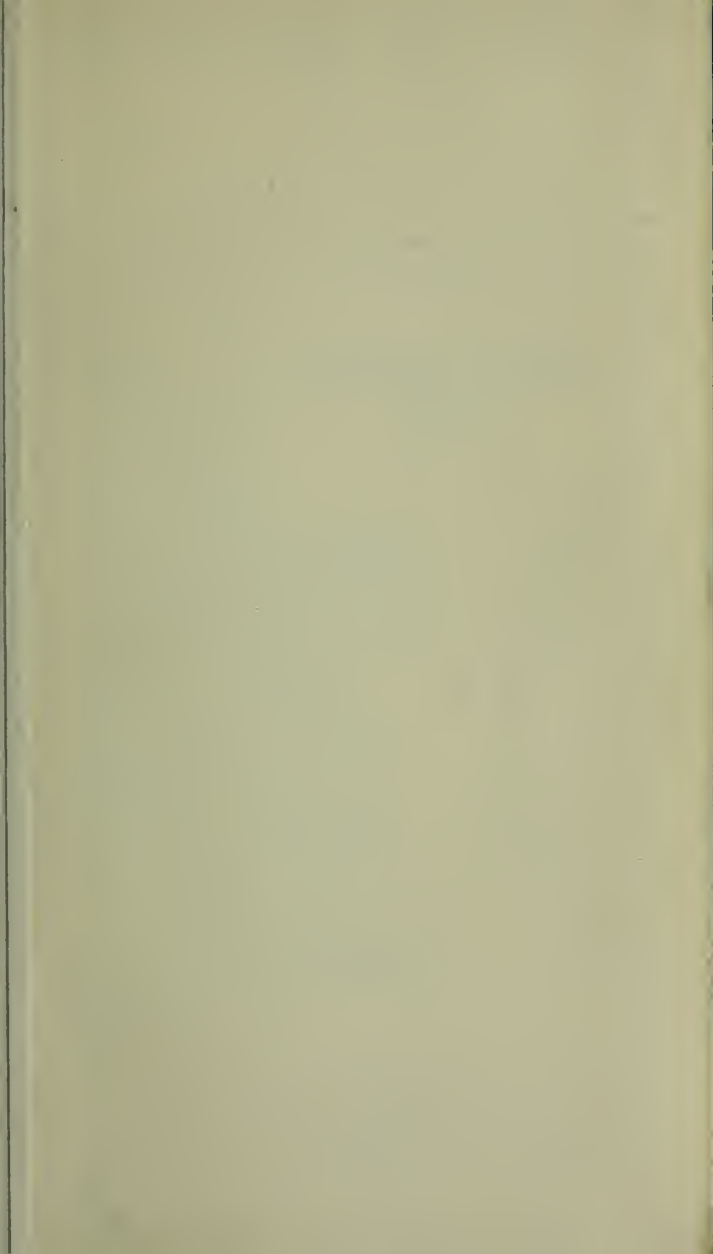
\* In many instances, it seemed almost as convenient to the reader to refer to the Marginal Analysis, as to have the points embodied in the Index, which, in that case, must have been very lengthy.

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256190

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